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No. 10-

Supreme Court, U.S.
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Supreme Court of the United States

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CONNIE E. YANT, BARBARA D. ALHEIT, TINY L. ANDERSON, NANCY K. BEDFORD, JENNIFER E. BLAIR, ROBERT COLEMAN BLAKEY, MARGUERITE E. CALLAHAN, CAROL CALLAWAY-LANE, BEATRICE EDMUNDSON, LORI EMERY, DONNA ESMOND, RAMONA FARRAR, LOIS E. FINCH, FRANKIE FISHER, DEBRA L. GREENSPAN, GLENDA HARRIS, LINDA T. HOWERTON, SANDRA KEY JASPER, JO ANN JOHNSON, LINDA LOUISE LAUGHLIN, JOHN H. LEWIS, KRISTI SUE LOWE, DAVID LEO LYBARGER, GERALYN MCVEIGH, VERNA PORTH, JACKLEN ROBINSON, TROY A. RUSSELL, AMY SADLER, STACY L. SCARBRO, AMANDA M. SHAW, LOURDES ELIZABETH SPITLER, ANDREA LEA STUPKA, KATHY L. WATKINS, JENNIFER WATSON and ROBIN DIANNE YOUNG,

Petitioners,

v.

UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John F. Burke, III*
**Counsel of Record*
MANSOUR, GAVIN, GERLACK & MANOS CO., L.P.A.
55 Public Square, Suite 2150
Cleveland, Ohio 44113
(216) 523-1500
jburke@mggmlpa.com

Counsel for Petitioners

Dated: March 15, 2010

THE LEX GROUP DC ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTIONS PRESENTED FOR REVIEW

Whether the Equal Pay Act precludes Petitioners as a mixed gender group from bringing allegations of violations of the Equal Pay Act against their employer when compared with other another mixed gender group performing positions requiring equal skill, effort and responsibility which are performed under similar working conditions?

Whether the predominantly female better educated nurse practitioners have established a *prima facie* case of an Equal Pay Act violation by alleging that they are paid less than the predominantly male less educated physician assistants on the basis of their gender for performing the same work?

LIST OF PARTIES TO PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all parties herein before the United States Court of Appeals for the Federal Circuit. The Petitioners here and appellants below are:

Connie E. Yant
Barbara D. Ahlheit
Tiny L. Anderson
Nancy K. Bedford
Jennifer E. Blair
Robert Coleman Blakey
Marguerite E. Callahan
Carol Callaway-Lane
Beatrice Edmundson
Lori Emery
Donna Esmond
Ramona Farrar
Lois E. Finch
Frankie Fisher
Debra L. Greenspan
Glenda Harris
Linda T. Howerton
Sandra Key Jasper
Jo Ann Johnson
Linda Louise Laughlin
John H. Lewis
Kristi Sue Lowe
David Leo Lybarger
Geralyn McVeigh
Verna Porth
Jacklen Robinson
Troy A. Russell
Amy Sadler
Stacy L. Scarbro
Amanda M. Shaw
Lourdes Elizabeth Spitler
Andrea Lea Stupka
Kathy L. Watkins
Jennifer Watson
Robin Dianne Young

The Respondent here and the appellee below is the United States.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows: No party is a corporation.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is reported at 588 F.3d 1369 (Fed. Cir. 2009) and is reprinted in the Appendix to the Petition ("App.") at App. 1-22. The district court's opinion is reported at 85 Fed. Cl. 264 (2009), and is reprinted at App. 23-44.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Federal Circuit issued its opinion on December 14, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Equal Pay Act, 29 U.S.C. § 206(d)(1).

> § 206. Minimum wages
>
> (d) Prohibition of sex discrimination.
>
> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires

> equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

STATEMENT OF THE CASE

This case represents an expansion of the *prima facie* case of the Equal Pay Act. 29 U.S.C. § 206(d)(1). This decision is in direct contravention of that of the United States Court of Appeals for the Sixth Circuit in *Laura Beck-Wilson, et al. v. Anthony Principi*, 441 F.3d, 353 (6th Cir. 2006).

The Petitioners filed suit on April 23, 2007 in the U.S. District Court, Middle District of Tennessee. The matter was subsequently transferred to the U.S. Court of Federal Claims. On March 6, 2008, Petitioners filed their complaint in the Court of Federal Claims. Petitioners alleged they were paid less for equal work on the basis of their gender in violation of the Equal Pay Act. Petitioners filed their original action alleging that Respondent had violated the Equal Pay Act of 1963, 29 U.S.C. § 206 ("EPA") due to the Veteran's

Administration ("VA") paying physician assistants ("PAs") (the predominantly male and less educated employee) more money than the nurse practitioners ("NPs") (the predominantly female and higher educated employee) for performing the exact same work. The NPs were seeking relief from the VA's continuous and ongoing violations of the EPA.

On August 12, 2008, Respondent filed a motion to dismiss the case which essentially alleged that because there were males and females in both PAs and NPs positions that the EPA did not apply. The Petitioners filed a brief in opposition on September 19, 2008. The case was transferred from Judge Robert H. Hodges, Jr. to Judge Christine O.C. Miller. At oral argument on October 20, 2008, Respondent withdrew its motion to dismiss. On November 5, 2008, Respondent filed a motion to dismiss pursuant to R.C.F.C. 12(b)(1) or in the alternative, a motion for summary judgment pursuant to R.C.F.C. 56. Petitioners responded on December 2, 2008.

The government's motion argued that because the PAs and NPs contain both males and females, the EPA did not apply. The government did not contend that Petitioners had failed to establish a *prima facie* case. The Petitioners opposed the United States' motion to dismiss as the court clearly had jurisdiction over the allegations raised in the Petitioner's complaint. The Petitioners also opposed the motion for summary judgment as Petitioners had put forth a *prima facie* EPA claim. On January 12, 2009, the Court of Federal Claims issued a Memorandum and Opinion Order denying the

motion to dismiss but granting the motion for summary judgment dismissing Petitioners' claim and entered its Judgment Entry on January 21, 2009. That court held:

> The EPA was not intended to remedy such a diffuse situation; rather, the EPA addresses unequal pay when the groups are not mixed. Plaintiffs do present that circumstance.

(District court opinion, App. 42.)

Petitioners filed a timely notice of appeal on March 18, 2009. On December 14, 2009, the Court of Appeals for the Federal Circuit issued an opinion affirming the district court's ruling granting summary judgment, however, it adopted a rationale that had not been briefed or argued by any party in either the district court or the appellate court. (App. 16-22.) A concurring opinion was entered agreeing with the judgment but not in the rationale. (App. 16-22.)

The Federal Circuit's opinion disregards the Sixth Circuit's analysis in *Laura Beck-Wilson, et al. v. Anthony Principi*, 441 F.3d 353 (6th Cir. 2006). The *Beck-Wilson* court faced the exact issue which was before the Federal Circuit. However, the Federal Circuit's majority opinion completely ignored the Sixth Circuit's decision and failed to even cite it in its opinion. The Sixth Circuit had reviewed these exact same facts and came to the conclusion that the district court had erred in granting the government's motion for summary

judgment. The Sixth Circuit rejected the argument put forward by the government that the EPA did not apply because there were mixed gender groups in each job classification. (*Id.*, App. 60-61.) The Sixth Circuit also rejected the government's argument that because the pay disparity was based on separate pay scales the EPA did not apply. (*Id.*, App. 775.) The Sixth Circuit reversed the grant of summary judgment and remanded the case back to the district court. That case subsequently settled and an equal pay scale was put in place.

Nurse Practitioners and Physician Assistants in the Tennessee Valley Healthcare System ("TVHS")

Nurse practitioners are advanced practice nurses who have advanced medical training. They are required to have a master's degree and they must be licensed in their individual state as an NP. NPs started in the early nineteen sixties. NPs are predominantly and historically female. (*See Beck-Wilson*, App. 48.)

Physician assistants are traditionally male and have a genesis from the predominantly and historically male United States military. (App. 48-49.) PAs have a general education in terms of practice, family health and have diversified their practice. PAs in the VA systems are not required to have degrees or a minimum level of education, but most of them have only associate degrees. (*See Beck-Wilson*, App. 48-49.)

In the TVHS, the VA will hire either a PA or a NP to fill the same position. There is nothing that a PA can do that a NP cannot do. However, NPs have a broader practice and there are many things that a NP can do that a PA cannot. The functional statements[1] of NPs and PAs are the same. Prior to 1991, NPs and PAs employed by the VA throughout the county were paid on the same scale. Thereafter, NPs were paid based upon a locality pay system and PAs were paid according to a national pay scale.

Although the pay inequity was clear and undisputed, the United States moved to dismiss this case contending that the Court of Federal Claims did not possess subject matter jurisdiction to entertain the complaint because the Equal Pay Act does not apply in this case. The United States argued that either the court lacked jurisdiction because the EPA is not applicable to groups with mixed genders or that it was entitled to summary judgment under the same argument.

The trial court granted summary judgment to the United States by judicial fiat by concluding that the EPA "addresses unequal pay when the groups are not mixed." This decision by the trial court was error, as the trial court did not determine that any plaintiff had failed to present a *prima facie* case, however, it merely concluded that the EPA does not apply when there are members of each gender in both groups. This decision was error and contrary to the purpose of the EPA.

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[1] A functional statement is the document created by the VA to describe the job that each position will perform.

The appellate court affirmed this opinion by the district court but did not adopt its rationale. The Federal Circuit erroneously determined that the "Yant plaintiffs fail to raise a genuine issue of material fact that the pay differential between NPs and PAs is based on sex, they have failed to make a *prima facie* case." (App. 14-15.) The government never argued that the Petitioners had failed to make a *prima facie* case.

The Federal Circuit's opinion disregards the Sixth Circuit's analysis in *Laura Beck-Wilson, et al. v. Anthony Principi*, 441 F.3d 353 (6th Cir. 2006). The Sixth Circuit Held that complete gender diversity is not required to satisfy a *prima facie* case. *Beck-Wilson*, (App. 61), *citing Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). The Federal Circuit, however, decided to ignore the existence of *Beck-Wilson*. In fact, the Federal Circuit's majority opinion is devoid of any reference to *Beck-Wilson*.

ARGUMENT

This case presents an exceptionally important question of federal law that has never been decided by this Court, *see* S. Ct. R. 10(b), and on which the Sixth Circuit and Federal Circuit are now in conflict, *see* S. Ct. R. 10(a). The Federal Circuit's opinion is in direct conflict with the Sixth Circuit's decision in *Beck-Wilson*. The *Beck-Wilson* case has exactly the same facts but had opposite outcomes.

The decision below expands the prima facie case required to prove an EPA violation and creates a split among the circuits which requires a resolution by this Court.

I. Review is Necessary to Address the *Prima Facie* Requirements of an Equal Pay Act Claim.

The appellate court in its decision has expanded the *prima facie* case. To establish a prima facie case under the Equal Pay Act, a plaintiff must demonstrate that an employer pays employees of opposite sexes different wages "for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions." *Corning Glass Works v. Brennan*, 417 U.S. at 196 (*quoting* 29 U.S.C. § 206(d)(1)). The jobs need not be identical to be "equal work" rather there must be a substantial quality of skill, effort, responsibility and working conditions. After a plaintiff establishes a *prima facie* case under the EPA, "the defendant must 'prove' that the wage differential is justified under one of the four affirmative defenses set forth under § 206(d)(1) of the Equal Pay Act: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; (4) any other factor other than sex." *Corning Glass Works*, 417 U.S. at 196. An employer's burden is both that of production and persuasion. *Peters v. City of Shreveport*, 818 F.2d 1148, 1154 (5th Cir. 1987). A differential is based on sex if the factor of sex is a "but for" cause of the differential. There is no further requirement under

the Act that sex be a "substantial factor" or "proximate cause" of the differential. Good faith on the part of the defendant is not a defense under the Act. *Id.* at 1161. Furthermore, intent is not element required under the Equal Pay Act. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Unless this Court reviews and reverses the Federal Circuit's opinion in the case below, the *prima facie* case will have been improperly expended. This ignores Congress' intent when it enacted the Equal Pay Act:

> The objective of this legislation is to insure that those who perform tasks which are determined to be equal shall be paid equal wages.
>
> The wage structure of all too many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. This bill would provide, in effect, that such outmoded belief can no longer be implemented and that equal work will be awarded by equal wages.

(109 Cong. Rec. 8914.)

Here, the Federal Circuit has added a new requirement into the EPA analysis. The Federal Circuit is now requiring, as part of the *prima facie* case, that the plaintiff demonstrate either a historic

or current pay differential based on sex. (App. 14.) Nonetheless, the Petitioners did demonstrate that the pay differential is historically based on sex. The VA pays the traditionally male job more than the traditionally female job.

II. Review is Proper because the Federal Circuit's Decision Below Creates a Split Among the Circuits.

In *Beck-Wilson*, the Sixth Circuit, in reviewing the exact issue that is before this Court, found that complete diversity between plaintiffs and comparators is not required to state a prima facie case under the EPA. That court stated:

> We agree that complete diversity between plaintiffs and comparators is not required to state a prima facie case under the EPA. As the Supreme Court stated in *Corning Glass Works*, "to permit [a] company to escape that [equal pay] obligation by agreeing to allow some women to work [in the male dominated position] at a higher rate of pay as vacancies occur would frustrate, not serve, Congress' ends.

Id. at 208; see *Allison v. United States*, 39 Fed. Cl. 471 (1997) (holding that a group of "predominantly female" NPs at the Portland, Oregon VA produced evidence that they performed substantially equal work as the "predominantly male" PAs for less pay in violation of the EPA); *Peters v. City of Shreveport*, 818 F.2d 1148 (5th Cir. 1987), (holding that the text

of the EPA does not require "near-perfect diversity between the classes"); *Arthur v. College of St. Benedict*, 174 F. Supp. 2d 968, 976 (D. Minn. 2001) (stating that the EPA "does not require perfect diversity between the comparison classes.")

The Federal Circuit's decision is in direct contravention with the Sixth Circuit. Further, the Second Circuit rejected a similar argument as did the Third Circuit. *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, *cert. denied*, 430 U.S. 946 (1976) (contending that the "mere existence of two separate statutory schemes for regulating the two professions is not a 29 U.S.C. § 206(d)(1)(iv) factor other than sex"; *Aldridge v. Randolph Central School District*, 903 F.2d 520 (2d Cir. 1982) (female "cleaners" could not be paid lower wages than male "custodians" because of a civil service classification).

The Federal Circuit's decision is in direct conflict with that of the Sixth Circuit. This Court should review this issue so as to cease any confusion among the circuit courts.

CONCLUSION

This Court should grant certiorari review to resolve the important question of whether the Equal Pay Act applies to mixed gender groups. Further, the answer will resolve the conflict among the two circuits and give guidance to the district courts.

Respectfully Submitted,

/s/ John F. Burke, III
JOHN F. BURKE, III (Ohio #0059974)
MANSOUR, GAVIN, GERLACK &
MANOS CO., L.P.A.
55 Public Square, Suite 2150
Cleveland, Ohio 44113-1994
Phone: 216-523-1500
Fax: 216-523-1705
Email: jburke@mggmlpa.com

Counsel for Petitioners

Dated: March 15, 2010

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[ENTERED: DECEMBER 14, 2009]
United States Court of Appeals
for the Federal Circuit

2009-5058

CONNIE E. YANT, BARBARA D. ALHEIT, TINY L. ANDERSON, NANCY K. BEDFORD, JENNIFER E. BLAIR, ROBERT COLEMAN BLAKEY, MARGUERITE E. CALLAHAN, CAROL CALLAWAY-LANE, BEATRICE EDMUNDSON, LORI EMERY, DONNA ESMOND, RAMONA FARRAR, LOIS E. FINCH, FRANKIE FISHER, DEBRA L. GREENSPAN, GLENDA HARRIS, LINDA T. HOWERTON, SANDRA KEY JASPER, JO ANN JOHNSON, LINDA LOUISE LAUGHLIN, JOHN H. LEWIS, KRISTI SUE LOWE, DAVID LEO LYBARGER, GERALYN MCVEIGH, VERNA PORTH, JACKLEN ROBINSON, TROY A. RUSSELL, AMY SADLER, STACY L. SCARBRO, AMANDA M. SHAW, LOURDES ELIZABETH SPITLER, ANDREA LEA STUPKA, KATHY L. WATKINS, JENNIFER WATSON and ROBIN DIANNE YOUNG,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the United States Court of Federal Claims

in CASE NO(S). 08-CV-077.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbarly
Jan Horbarly, Clerk

Dated: December 14, 2009

ISSUED AS A MANDATE: February 4, 2010

United States Court of Appeals
for the Federal Circuit

2009-5058

CONNIE E. YANT, BARBARA D. ALHEIT, TINY L. ANDERSON, NANCY K. BEDFORD, JENNIFER E. BLAIR, ROBERT COLEMAN BLAKEY, MARGUERITE E. CALLAHAN, CAROL CALLAWAY-LANE, BEATRICE EDMUNDSON, LORI EMERY, DONNA ESMOND, RAMONA FARRAR, LOIS E. FINCH, FRANKIE FISHER, DEBRA L. GREENSPAN, GLENDA HARRIS, LINDA T. HOWERTON, SANDRA KEY JASPER, JO ANN JOHNSON, LINDA LOUISE LAUGHLIN, JOHN H. LEWIS, KRISTI SUE LOWE, DAVID LEO LYBARGER, GERALYN MCVEIGH, VERNA PORTH, JACKLEN ROBINSON, TROY A. RUSSELL, AMY SADLER, STACY L. SCARBRO, AMANDA M. SHAW, LOURDES ELIZABETH SPITLER, ANDREA LEA STUPKA, KATHY L. WATKINS, JENNIFER WATSON and ROBIN DIANNE YOUNG,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

John F. Burke, III, Mansour, Gavin, Gerlack & Manos, Co., LPA, of Cleveland, Ohio, argued for plaintiffs-appellants.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Patricia McCarthy, Assistant Director. Of counsel on the brief was Raney Irwin, Attorney, Regional Counsel Office, United States Department of Veterans Affairs, of Nashville, Tennessee.

Appealed from: United States Court of Federal Claims

Judge Christine O.C. Miller

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2009-5058

CONNIE E. YANT, BARBARA D. ALHEIT, TINY L. ANDERSON, NANCY K. BEDFORD, JENNIFER E. BLAIR, ROBERT COLEMAN BLAKEY, MARGUERITE E. CALLAHAN, CAROL CALLAWAY-LANE, BEATRICE EDMUNDSON, LORI EMERY, DONNA ESMOND, RAMONA FARRAR, LOIS E. FINCH, FRANKIE FISHER, DEBRA L. GREENSPAN, GLENDA HARRIS, LINDA T. HOWERTON, SANDRA KEY JASPER, JO ANN JOHNSON, LINDA LOUISE LAUGHLIN, JOHN H. LEWIS, KRISTI SUE LOWE, DAVID LEO LYBARGER, GERALYN MCVEIGH, VERNA PORTH, JACKLEN ROBINSON, TROY A. RUSSELL, AMY SADLER, STACY L. SCARBRO, AMANDA M. SHAW, LOURDES ELIZABETH SPITLER, ANDREA LEA STUPKA, KATHY L. WATKINS, JENNIFER WATSON and ROBIN DIANNE YOUNG,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 08-CV-077, Judge Christine O.C. Miller.

DECIDED: December 14, 2009

Before NEWMAN, MAYER, and PROST, Circuit Judges.

Opinion for the court filed by Circuit Judge MAYER. Concurring opinion filed by Circuit Judge PROST.

MAYER, Circuit Judge.

Plaintiffs appeal the judgment of the United States Court of Federal Claims granting the United States summary judgment that Plaintiffs do not qualify for coverage under the Equal Pay Act, 29 U.S.C. § 206(d)(1). Yant v. U.S., 85 Fed. Cl. 264 (2009). We affirm.

BACKGROUND

The thirty-five plaintiffs ("the Yant plaintiffs") are current and former nurse practitioners ("NPs") employed by the United States Department of Veterans Affairs ("VA") in the Tennessee Valley Healthcare System ("TVHS"). The Yant plaintiffs brought suit against the VA under the Equal Pay Act, 29 U.S.C. § 206(d) et seq., alleging that, as predominantly female NPs, they are paid at a lower rate than the predominantly male physician assistants ("PAs") in the THVS, performing jobs of

equal skill, effort, and responsibility under similar working conditions. The VA hires NPs and PAs to fill the same TVHS positions, and the functional statements (i.e. job descriptions) are the same for NPs and PAs. NPs, unlike PAs, are required to have a master's degree and are licensed through their states.

From 2004 to 2008, the percentage of female NPs in the TVHS ranged from 78.4% to 80.6%. For example, in July 2008, fifty-five of the sixty-nine NPs employed by the TVHS were females. During the same time period, the percentage of female PAs in the TVHS ranged from 40% to 44%. For example, in July 2008, eight of the twenty PAs employed by the TVHS were females.

Based on these statistics, the Yant plaintiffs allege that the VA discriminated against NPs "by paying them less than the predominantly male PAs." They brought suit in the Court of Federal Claims alleging that, as a result of the VA's conduct, they have suffered loss of compensation, fringe benefits, future earnings, reputation, self-esteem, time, money, and have also suffered humiliation and embarrassment.

The VA moved to dismiss the case arguing that the court lacked jurisdiction or, alternatively, that it was entitled to summary judgment because the Equal Pay Act does not apply to mixed-gender groups. The court found that it did have jurisdiction, but that the gender ratios in this case were sufficient to deny liability under the Equal Pay Act on summary judgment.

The Yant plaintiffs appeal the grant of summary judgment and the conclusion that they do not qualify for coverage under the Equal Pay Act. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review a grant of summary judgment by the Court of Federal Claims de novo. Suess v. United States, 535 F.3d 1348, 1359 (Fed. Cir. 2008). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id. When ruling on a motion for summary judgment, all of the nonmovant's evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

In 1963, Congress amended the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, to prevent gender-based wage discrimination by enacting the Equal Pay Act. Specifically, the Equal Pay Act prohibits employers from discriminating on the basis of sex by paying an employee at a rate less than that paid to an employee of the opposite sex for performing equal work. See 29 U.S.C. § 206(d)(1). The Act provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such

> establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Id. (emphasis in original).

"The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve." Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974). In order to establish a prima facie case of wage discrimination under the Equal Pay Act, plaintiffs "must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" Id. at 195 (quoting 29 U.S.C. § 206(d)(1)).

Once plaintiffs have carried their burden, "the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." Id. at 196. Specifically, the employer can avoid liability by proving that payment to employees of the opposite sex "is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1).

For purposes of this case, it is undisputed that the NP and PA positions require equal skill, effort, and responsibility, and are performed under similar working conditions. The gender make-up of these two groups of employees at the TVHS is, likewise, undisputed.

The Yant plaintiffs argue that they established a prima facie case and that the trial court erred by not finding that the gender ratios of the NPs and PAs were sufficient to raise a genuine issue of material fact. In response, the government relies heavily on remarks made by Representative Goodell in the legislative history of the Equal Pay Act. Specifically, the third item in the "examples and general guidelines" states that "[d]ifferences in pay between groups or categories of employees that contain both men and women within the group or category are not covered by this act." 109 Cong. Rec. 9209 (1963).

We agree that summary judgment was appropriate, but for reasons other than gender ratios. As discussed below, the plaintiffs have failed to raise a genuine issue of material fact that the pay differential between NPs and PAs is either historically or presently based on sex.

Corning Glass Works guides our decision. From 1944 to 1966, Corning paid male night-shift inspectors more than female day-shift inspectors. The pay differential was implemented at a time when state law prohibited women from working at night. Id. at 191-92. In 1966, Corning opened the night shift to female employees, but retained the higher wage for night inspectors. Id. at 205. This allowed some women to enjoy the higher night salary after 1966. The day inspectors, however, remained entirely female and were compensated at the lower salary level.

The Supreme Court found that the night and day inspectors were engaged in "equal work," and rejected Corning's affirmative defense that the shift differential was a "factor other than sex" justifying the disparate wages. Id. at 203-05. The Court held that this post-1966 disparity between night and day wages perpetuated the 1944-1966 wage differential made illegal by the Equal Pay Act. Id. at 209-10.

A key distinction between Corning Glass Works and the case before us is how the differential in pay arose. In Corning Glass Works, "[t]he differential arose simply because men would not work at the low rates paid women inspectors." Id. at 205. In other words, the difference in pay was based

solely on gender. As such, and consistent with the language of the statute, this was a violation of the Equal Pay Act. See 29 U.S.C. § 206(d)(1) ("No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex . . . ." (emphasis added)). This also finds support in the legislative history. See, e.g., H.R. Rep. No. 88-309, at 3 (1963) (noting that the Equal Pay Act "declares that wage differentials based solely on the sex of the employee are an unfair labor standard" (emphasis added)); 109 Cong. Rec. 9196 (1963) (statement of Rep. Thompson) ("[The Equal Pay Act] only applies to instances where men and women are doing work and where there is a wage differential based solely on sex." (emphasis added)).

Here, the pay differential between NPs and PAs is based on two separate pay scales, one that is regionally based (the NP scale) while the other is nationally based (the PA scale). In fact, the Yant plaintiffs concede that prior to 1991 both NPs and PAs were paid on the same national salary scale. Based on the current NP and PA pay scales, the salary for NPs exceeds that of PAs in some areas of the country. In these areas, it is the male PAs that seek relief under the Equal Pay Act, alleging that the predominantly female NPs are paid more for equal work. See, e.g., Alverson v. United States, 88 Fed. Cl. 331 (2009). The result is that both male and female NPs seek succor under the Equal Pay Act in one region, and simultaneously male and female PAs in a different region seek the same relief.

The Yant plaintiffs did not present any evidence that the decision to pay PAs on a national scale and NPs on a regional scale had any basis in sex, historically or presently. Other courts have held that proof of discriminatory intent is not required to establish a prima facie case under the Equal Pay Act, see, e.g., Peters v. City of Shreveport, 818 F.2d 1148, 1153 (5th Cir. 1987), abrogated on other grounds, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), but there is a fundamental difference between a showing of discriminatory intent and a showing that discrimination based on sex exists or at one time existed.

An examination of congressional intent clearly evidences that the burden is on the plaintiff to show the latter. "I should like to make it clear that the burden of proof to show a violation is on the Secretary of Labor; he must prove that any differential in pay which exists is actually based on sex, and he will have to sustain that burden of proof. I think this is a very important part of the legislative history." 109 Cong. Rec. 9208 (1963) (statement of Rep. Griffin). Representative Goodell's remarks, which echo this view, are instructive as he was the principal proponent of the bill. County of Washington v. Gunther, 452 U.S. 161, 171 (1981). He explained that "[t]he Secretary would have to establish a prima facie case showing that there is discrimination based on the factor of sex. If that is done, then, of course, the employer could rebut the proof and show that the differential was based upon factors other than sex." 109 Cong. Rec. 9208 (1963); see also id. ("If [the employer] has a reasonable standard of differentiation, the [plaintiff] is not to

come in, even, and judge the reasonableness or unreasonableness of this differentiation among employees, except as it shows a clear pattern of discrimination against sex.").

Mere reliance on gender ratios of two groups does not establish discrimination based on sex. In fact, an example in the legislative history explicitly cautions against applying the Equal Pay Act in a situation similar to the facts here: "We do not have in mind the [plaintiff] going into an establishment and saying, 'Look, you are paying the women here $1.75 and the men $2.10. Come on in here, Mr. Employer, and you prove that you are not discriminating on the basis of sex.'" Id. (statement of Rep. Goodell).

We are mindful of the Supreme Court's admonition that permitting employers to avoid liability under the Equal Pay Act "by agreeing to allow some women to work . . . at a higher rate of pay as vacancies occurred would frustrate, not serve, Congress' ends." Corning Glass Works, 417 U.S. at 208. This case, however, is completely devoid of the historical discrimination at issue in Corning Glass Works, and the record before us does not suggest that the TVHS is hiring female PAs to avoid liability under the Equal Pay Act. An Equal Pay Act violation is established when an employee demonstrates past or present discrimination based on sex. There has been no such showing here. Therefore, the ratios of males to females are irrelevant. Because the Yant plaintiffs fail to raise a genuine issue of material fact that the pay differential between NPs and PAs is

based on sex, they have failed to make a prime facie case.

CONCLUSION

Accordingly, the judgment of the Court of Federal Claims is affirmed.

AFFIRMED

United States Court of Appeals
for the Federal Circuit

2009-5058

CONNIE E. YANT, BARBARA D. ALHEIT, TINY L. ANDERSON, NANCY K. BEDFORD, JENNIFER E. BLAIR, ROBERT COLEMAN BLAKEY, MARGUERITE E. CALLAHAN, CAROL CALLAWAY-LANE, BEATRICE EDMUNDSON, LORI EMERY, DONNA ESMOND, RAMONA FARRAR, LOIS E. FINCH, FRANKIE FISHER, DEBRA L. GREENSPAN, GLENDA HARRIS, LINDA T. HOWERTON, SANDRA KEY JASPER, JO ANN JOHNSON, LINDA LOUISE LAUGHLIN, JOHN H. LEWIS, KRISTI SUE LOWE, DAVID LEO LYBARGER, GERALYN MCVEIGH, VERNA PORTH, JACKLEN ROBINSON, TROY A. RUSSELL, AMY SADLER, STACY L. SCARBRO, AMANDA M. SHAW, LOURDES ELIZABETH SPITLER, ANDREA LEA STUPKA, KATHY L. WATKINS, JENNIFER WATSON and ROBIN DIANNE YOUNG,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 08-CV-077, Judge Christine O.C. Miller.

PROST, Circuit Judge, concurring in the result.

While I agree with the majority's ultimate conclusion, I cannot agree with the reasoning espoused in reaching that conclusion.

I

I concur in the result because the trial court properly granted summary judgment based upon the gender ratios at issue in this case. As Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974), established, and as the United States Court of Federal Claims recognized, "[a] group of plaintiffs does not have to be exclusively one gender to attain standing as aggrieved persons" under the Equal Pay Act ("EPA"). Yant v. United States, 85 Fed. Cl. 264, 268 (2009) (emphasis added). Mixed-gender groups will be, in some circumstances, capable of alleging violations of the EPA. In Corning, for instance, the Supreme Court held that the employer could not escape EPA liability by leaving the wage disparity in place and simply permitting lower-paid women in the day shift to "bid for jobs" in the higher-paid, male dominated night shift. 417 U.S. at 205. As a result, even though women were allowed into the higher-paid night shift—indeed, the Court specifically stated that the employer had made "more than a token gesture to end discrimination"—the Court held

that the employer violated the EPA. Id. at 205–06.[1] Thus, Corning established that the mere presence of the disadvantaged sex in the higher-paid group will not destroy a cause of action under the EPA.

Here, the Court of Federal Claims framed the issue clearly: "Whether the imprecise division between a point where courts should protect groups from being subjected to attempts to avoid EPA liability through a loophole and a point where employees are part of a mixed-gender group not covered by the EPA creates a contested issue of fact. . . ." Yant, 85 Fed. Cl. at 271; see id. at 268 ("No magic threshold or ratio determines whether a mixed-sex group of plaintiffs is protected by the EPA. In fact, 'whether a policy affects both male and female employees to such an extent that an EPA claim would be invalid is a question of fact.'" (quoting Beck-Wilson v. Principi, 441 F.3d 353, 362 (6th Cir. 2006))).

[1] This is because it is not enough to permit the discriminated-against sex to apply for and obtain jobs in the higher-paid field; instead, "the company could not cure its violation except by equalizing the base wages of female day inspectors with the higher rates paid the night inspectors." Corning, 417 U.S. at 206.

The relevant facts are not in dispute. The trial court first established that about 20% of the lower-paid nurse practitioner ("NP") group were "putatively preferred" men, while about 40% of the higher-paid physician's assistant ("PA") group were "putatively disadvantaged" women. Id. at 272. Further, "[n]o suggestion [wa]s present, nor d[id] plaintiffs allege, that the agency hired token men as NPs or token women as PAs to avoid a cause of action under the EPA." Id. As the trial court noted, to establish a prima facie case under the EPA, the plaintiffs had to show that their employer paid "different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" Corning, 417 U.S. at 195. In this case, nearly half of the higher-paid group is female. In my view, given the significant participation of each gender in both classes, and given that the plaintiffs failed to allege that the significant participation was some attempt to escape liability under the EPA, the plaintiffs failed to establish that their employer "paid different wages to employees of opposite sexes." The trial court likewise concluded that the plaintiffs had failed to establish their prima facie case and held that the government was entitled to summary judgment. I see no reason to disturb those conclusions based on the undisputed facts of this case.

II

The majority agrees that summary judgment is appropriate, but discards the trial court's reasoning; instead, the majority imports a novel requirement into the plaintiff's prima facie case in granting summary judgment where "the plaintiffs have failed to raise a genuine issue of material fact that the pay differential between NPs and PAs is either historically or presently based on sex." Maj. Op. at 5. As the majority recognizes, the EPA does not require a discriminatory intent. Nevertheless, it proceeds to state that "there is a fundamental difference between a showing of discriminatory intent and a showing that discrimination based on sex exists or at one time existed." In attempting to draw this line, the majority fails to recognize the fundamental difference between establishing a prima facie case sufficient to survive a motion for summary judgment and ultimate success on the merits.

The EPA provides, in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions,

> except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d)(1) (emphasis added). By establishing all of the elements of his or her prima facie case—"that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions,'" Corning, 417 U.S. at 195—a plaintiff has effectively shown that discrimination based on sex exists or at one time existed, at least for purposes of surviving a motion for summary judgment. Nothing else is required.

The majority's misreading becomes apparent when it focuses upon the fact that "the pay differential between NPs and PAs is based on two separate pay scales, one that is regionally based (the NP scale) while the other is nationally based (the PA scale)." Maj. Op. at 6. This fact has nothing to do with the plaintiffs' prima facie case, and to discuss it in this context is to conflate the plaintiffs' burden to establish a prima facie case under the EPA with the government's burden to prove that any pay differential is "based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv); see Corning, 417 U.S. at 196 (after plaintiffs establish a prima facie case, "the burden shifts to the employer to show that the differential is justified under one of the Act's four

exceptions"). Indeed, the majority makes this explicit, stating that "[t]he Yant plaintiffs did not present any evidence that the decision to pay PAs on a national scale and NPs on a regional scale had any basis in sex, historically or presently." Assuming arguendo that the plaintiffs otherwise established a prima facie case, however, it is the government's burden to prove that the pay scales did not have any basis in sex. On these facts, it may well be that the government would carry that burden, but that is not the question to be answered at this stage in the proceedings.

Thus, I concur in the result because I would affirm the trial court based on the composition of the mixed-gender groups in this case (see Part I), but not for the reasons articulated by the majority.

[ENTERED: JANUARY 12, 2009]
In the United States Court of Federal Claims

No. 08-77C
(Filed January 12, 2009)

* *

CONNIE E. YANT, *et al.*,	* Civilian pay; * RCFC 12(b)(1) * motion to dismiss
Plaintiffs,	* for lack of subject
v.	* jurisdiction based * on gender balance
THE UNITED STATES,	* of preferred class; * RCFC 56 motion
Defendant.	* for summary * judgment; Equal * Pay Act, 29 U.S.C. * § 206(d)(1) (2000); * consent to motion * for summary * judgment under * RCFC 12(b)(1) to * address claim on * merits.

* *

John F. Burke, III, Cleveland, OH, for plaintiffs.

Douglas G. Edelschick, Washington, DC, with whom was Assistant Attorney General Gregory G. Katsas, for defendant. Raney Irwin, Department of Veterans Affairs, Regional Counsel's Office, Nashville, TN, of counsel.

MEMORANDUM OPINION AND ORDER

MILLER, Judge.

This case is before the court after argument on defendant's motion to dismiss pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, pursuant to RCFC 56 for summary judgment. Plaintiffs seek an award of damages under the Equal Pay Act, 29 U.S.C. § 206(d)(1) (2000) (the "EPA"), based on allegations that as federal employees they receive lower wages due to their gender. Defendant has moved to dismiss the complaint on the ground that jurisdiction is not established or for judgment in its favor because the EPA does not apply to groups of employees with a substantial number of both men and women.

BACKGROUND

Connie E. Yant, on behalf of other similarly situated individuals ("plaintiffs"), filed suit on March 6, 2008. Defendant filed its Answer and Affirmative Defense1/ on May 1, 2008. On August 12, 2008, defendant filed a motion to dismiss the complaint based on subject matter jurisdiction,2/ plaintiffs replied, and the motion was fully briefed on October

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1/ Defendant claims that the VA's salary scales for Physicians Assistants and Nurse Practitioners compensate employees in compliance with federal law.

2/ Judge Hodges had entered an order on July 21, 2008, requiring the parties to address jurisdiction. Thereafter, he directed defendant to file a motion pursuant to RCFC 12(b)(1), although defendant previously had answered. See Def.'s Br. filed Aug. 12, 2008, at 1 n.1.

1, 2008. This case had been transferred from Senior Judge Robert H. Hodges, Jr., on September 19, 2008. By order entered on October 15, 2008, this court ordered oral argument on defendant's motion to dismiss. After orally withdrawing its motion to dismiss during argument on October 20, 2008, defendant filed on November 5, 2008, a reframed motion to dismiss under RCFC 12(b)(1) or, in the alternative, a motion for summary judgment pursuant to RCFC 56. Plaintiffs responded on December 2, 2008, and defendant replied on December 9, 2008. The parties declined an opportunity for further oral argument.

FACTS

The following facts are derived from plaintiffs' complaint and defendant's proposed findings of uncontroverted fact.3/ Unless otherwise noted, all facts are construed in the light most favorable to plaintiffs.

Plaintiffs, current and former Nurse Practitioners ("NPs"), work throughout Tennessee and are employed by the United States Department of Veterans Affairs (the "VA") in the Tennessee Valley Healthcare System (the "TVHS").

At least since 2004, NPs working for the VA in the TVHS have been compensated at a lower rate than Physician Assistants ("PAs") working in the same system. NPs and PAs perform duties of equal skill, responsibility, and effort; and the VA cannot

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3/ Plaintiffs agree with Defendant's Proposed Findings of Uncontroverted Fact. Pls.' Br. filed Dec. 2, 2008, at 3 n.1.

justify the wage differential based on a seniority system, merit system, or any system that measures quality or quantity of production. The only difference between PAs and NPs working in the TVHS is that NPs are "predominantly female" and PAs are "predominantly male," and the two job categories are compensated at different levels. Compl. filed Mar. 6, 2008, ¶¶ 3, 13, 24.

Plaintiffs allege, based on the foregoing facts, that the difference in compensation is unjustified and is in violation of the EPA.

Defendant has illuminated the gender composition of PAs and NPs in the TVHS. As part of its motion for summary judgment, defendant attached a Declaration from Miriam L. Burks, the Human Resources Specialist in the Murfreesboro, Tennessee office of the VA in the TVHS. Ms. Burks set forth the gender composition in the NP and PA groups working for the VA in Tennessee from 2004 to 2008. As of January 2004, 78.4% (29 of 37) of NPs were female, and 21.6% (8 of 37) were male. As of January 2005, 79.5% (35 of 44) of the NPs were female, while 20.5% (9 of 44) were male. As of January 2006, 79.2% (38 of 48) of the NPs were female, and 20.8% (10 of 48) were male. As of April 2007, 80.6% (54 of 67) of NPs were female, and 19.4% (13 of 67) of NPs were male. As of February 2008, 78.9% (56 of 71) of NPs were female, and 21.1% of NPs were male (15 of 71). As of July 2008, 79.7% (55 of 69) of NPs were female, and (14 of 69) 20.3% of NPs were male. Ms. Burks also provided the gender composition of PAs working for the TVHS during that same time period: in January 2004 the

PAs were 42.1% (8 of 19) female and 57.9% (11 of 19) were male. In January 2005 44.4% (8 of 18) of the PAs were female, and 55.6% (10 of 18) were male. In January 2006 41.2% (7 of 17) PAs were female, and 58.8% (10 of 17) were male. In April 2007 42.1% (8 of 19) were female, and 57.9% (11 of 19) were male. In February 2008 PAs were 40% (8 of 20) female, and 60% (12 of 20) were male, and in July 2008 the composition remained the same – PAs were 40% female (8 of 20) and 60% male (12 of 20).

Plaintiffs allege that the VA intentionally, or recklessly, has discriminated against NPs because they are predominantly female. As a result, plaintiffs charge that they have lost compensation, fringe benefits, and future earnings and suffered from loss of reputation and self-esteem, humiliation, and embarrassment – all attributable to the TVHS's discrimination and plaintiffs' effort to pursue legal remedies through their lawsuit.

DISCUSSION

I. Whether defendant's challenge goes to the subject matter jurisdiction of the United States Court of Federal Claims

1. Standard of review

Jurisdiction must be established before the court may proceed to the merits of a case. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88-89 (1998). Any party may challenge, or the court may raise *sua sponte*, subject matter jurisdiction at any point in a proceeding, even upon appeal. Arbaugh v.

Y&H Corp., 546 U.S. 500, 506 (2006). Once the court's subject matter jurisdiction is put into question, it is "incumbent upon [the plaintiff] to come forward with evidence establishing the court's jurisdiction. [The plaintiff] bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence." Reynolds v. Army and Air Force Exch. Serv., 846 F.2d 746, 748 (Fed. Cir. 1988); McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Myers Investigative & Sec. Servs., Inc. v. United States, 275 F.3d 1366, 1369 (Fed. Cir. 2002). Federal courts are presumed to lack jurisdiction unless the record affirmatively indicates the opposite. Renne v. Geary, 501 U.S. 312, 316 (1991).

Both the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000), and the Little Tucker Act, 28 U.S.C. § 1346(a)(2) (2000), define the jurisdictional reach of the Court of Federal Claims. The Tucker Act "confers jurisdiction upon the Court of Federal Claims over the specified categories of actions brought against the United States, and . . . waives the Government's sovereign immunity for those actions." Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc); see also Emery Worldwide Airlines, Inc. v. United States, 49 Fed. Cl. 211, 220, aff'd, 264 F.3d 1071, 1080 (Fed. Cir. 2001) (holding that United States Postal Service is a "federal agency" within meaning of Administrative Disputes Resolution Act, and, thus, jurisdiction over it exists under Tucker Act). In certain actions against the United States for less than $10,000.00, the Little Tucker Act grants concurrent jurisdiction to United States district

courts and the Court of Federal Claims. See 28 U.S.C. § 1346(a)(2).

In Fisher the United States Court of Appeals for the Federal Circuit sought to clarify Tucker Act jurisprudence, which had blended the questions of the Court of Federal Claims' jurisdictional grant with the merits of the claim. "This mixture has been a source of confusion for litigants and a struggle for courts." 402 F.3d at 1172. As the Federal Circuit elucidated, the Tucker Act does not provide any substantive causes of action. "[I]n order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages." Id.; see also United States v. Mitchell, 463 U.S. 206, 216 (1983).

The Federal Circuit adopted a single-step approach to addressing whether a constitutional provision, statute, or regulation is money-mandating and, therefore, within the jurisdiction of the Court of Federal Claims:

> When a complaint is filed alleging a Tucker Act claim based on a Constitutional provision, statute, or regulation, . . . the trial court at the outset shall determine, either in response to a motion by the Government or *sua sponte* . . . , whether the Constitutional provision, statute, or regulation is one that is money-mandating.

> If the court's conclusion is that the Constitutional provision, statute, or regulation meets the money-mandating test, the court shall declare that it has jurisdiction over the cause, and shall then proceed with the case in the normal course . . . .
>
> If the court's conclusion is that the source as alleged and pleaded is not money-mandating, the court shall so declare, and shall dismiss the cause for lack of jurisdiction, a Rule 12(b)(1) dismissal--the absence of a money-mandating source being fatal to the court's jurisdiction under the Tucker Act.

Fisher, 402 F.3d at 1173.

The Federal Circuit has refined the test for subject matter jurisdiction espoused in Fisher to address the relationship between the nature of a plaintiff's claim and a properly pleaded money-mandating source. The current test, designed to prevent "seriously undermin[ing] Congress's decision to vest the Court of Federal Claims with exclusive jurisdiction over claims [in excess of $10,000] against the United States. . . ," is "a determination that the claim is founded upon a money-mandating source and the plaintiff has made a nonfrivolous allegation that it is within the class of plaintiffs entitled to recover under the money-mandating source." Jan's Helicopter Serv., Inc. v. Federal Aviation Admin., 525 F.3d 1299, 1309 (Fed. Cir. 2008) (affirming U.S.

district court's transfer to Court of Federal Claims to assert properly subject matter jurisdiction). Only after this initial inquiry will the court look to "determine whether the additional allegations of the complaint state a nonfrivolous claim on the merits." Id.; see also Greenlee County v. United States, 487 F.3d 871, 876 (Fed. Cir. 2007) ("Only after this initial inquiry is completed and the Court of Federal Claims takes jurisdiction over the case does it consider the facts specific to the plaintiff's case . . .").

2. The Equal Pay Act

In 1963, as an amendment to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2000), Congress enacted the EPA to prevent gender-based wage discrimination. See generally Lissak v. United States, 49 Fed. Cl. 281, 284 (2001) (explicating EPA's history and purpose is to "help eliminate society's age-old belief in the inferiority of women and the economic and social consequences that flowed from that belief."). The EPA forbids employers from discriminating

> between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a

> seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex...

29 U.S.C. § 206(d)(1). A plaintiff must establish a prima facie case, after which the burden shifts to defendant. First, the complainant must show that the employing agency is, or was, inequitably paying wages to employees "'for equal work on jobs the performance of which requires skill, effort, and responsibility, and which are performed under working conditions.'" Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (quoting 29 U.S.C. § 206(d)(1)). Once the plaintiff overcomes the burden of showing that the employing agency defendant is paying workers of one sex more than workers of the other sex for equal work, the burden shifts to the defendant to establish that the payments in question are justified by any of the four exceptions listed in the EPA.

Defendant's motion to dismiss challenges whether plaintiffs have established a prima facie case under the EPA. Defendant argues that the gender composition of NPs working for the TVHS, the class of employees asserting the EPA challenge, is too heterogenous to qualify as claimants under the EPA. Thus, if the EPA does not apply to this case due to excessive gender diversity among the groups of NPs and PAs, the complaint must be dismissed for lack of subject matter jurisdiction.

3. The gender requirements for a prima facie EPA claim

A group of plaintiffs does not have to be exclusively one gender to attain standing as aggrieved persons under the EPA. The United States Supreme Court in Corning explicitly held that "[t]o permit the [defendant] to escape [the] obligation [to pay men and women equally under the EPA] by agreeing to allow some women to work [with a group dominated by men] would frustrate, not serve, Congress' ends." 417 U.S. at 208. No magic threshold or ratio determines whether a mixed-sex group of plaintiffs is protected by the EPA. In fact, "whether a policy affects both male and female employees to such an extent that an EPA claim would be invalid is a question of fact." Beck-Wilson v. Principi, 441 F.3d 353, 362 (6th Cir. 2006).

In evaluating the facts of a case, it is important to consider that the purpose of the EPA is to prevent gender-based discrimination. To that end, "after a certain indefinable point, the integration within each of the classes compared becomes such that any wage differential is clearly based on a factor other than sex." Hofmister v. Miss. State Dep't of Health, 53 F. Supp. 2d 884, 892 (S.D. Miss. 1999) (quoting Peters v. City of Shreveport, 818 F.2d 1148, 1164 (5th Cir. 1987)). This indefinable point lies somewhere between a group that is predominantly one gender and a group in which the challenged EPA policy affects both men and women equally. See Allison v. United States, 39 Fed. Cl. 471, 473 (1997) (describing group of NPs comprised of 76% women (19 of 25) and group of PAs comprised of 66% men

(10 of 15) as being predominantly female and predominantly male, respectively); see also Beck-Wilson, 441 F.3d at 362 (quoting Arthur v. Coll. of St. Benedict, 174 F. Supp. 2d 968, 976 (D. Minn. 2001) (when challenged policy affects both men and women equally, "there can be no EPA violation")).

Plaintiffs' complaint does not specify the gender ratios present in the PA and NP populations at issue. Plaintiffs describe the NPs as "predominantly and historically male" and the PAs as being equally "predominantly and historically female." Compl. ¶¶ 13, 16, 19, 30, 31. While, in Allison, the Court of Federal Claims used the terms "predominantly male" and "predominantly female" to describe groups of NPs and PAs, gender composition was not at issue, and definite numbers underlay the "predominant" description. Allison, 39 Fed. Cl. at 474 n.3.

Defendant has submitted evidence from Ms. Burks, and plaintiffs agree with her factual assertions. Ms. Burks declared that between 2004 and 2008 the percentage of male NPs fluctuated between 19.4% and 21.6% (conversely, the number of female NPs fluctuated between 78.4% and 80.6%). Ms. Burks also declared that between 2004 and 2008 the percentage of female PAs had fluctuated between 40.0% and 44.4% (conversely, the number of male PAs fluctuated between 55.6% and 60%).

Defendant argues that, even if plaintiffs establish all the elements of a claim under the EPA, plaintiffs do not come within the class of plaintiffs entitled to recover under the EPA. As such,

defendant acknowledges that the EPA is a money-mandating statute, but moves for dismissal under 12(b)(1), arguing that under the first prong of the Fisher test the EPA does not apply in this case because there is an insufficient gender imbalance within and between the two job classifications.

Plaintiffs counter that Fisher sets a low bar for plaintiffs to overcome and supports subject matter jurisdiction in this case. Pls.' Br. filed Dec. 2, 2008, at 9. Citing Jan's Helicopter, 525 F.3d 1299, 1309, and Litecubes, LLC v. N. Light Prod., 523 F.3d 1353 (2008), reh'g and reh'g en banc denied, 2008 U.S. App. LEXIS 14170 (Fed. Cir. June 19, 2008), plaintiffs contend that they qualify as a group that satisfies the nonfrivolous jurisdictional standard espoused in Jan's Helicopter4/ and that they have made a "nonfrivolous allegation that is within the class of plaintiffs entitled to recover under the [EPA]." Id. at 9. Moreover, as discussed in Litecubes, even if plaintiffs' cause of action were to ultimately fail, "'failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal

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4/ Jan's Helicopter elucidated the standard, first articulated in Fisher, for establishing jurisdiction under the Tucker Act. Jan's Helicopter teaches that jurisdiction is established under the Tucker Act if the plaintiff makes a "nonfrivolous assertion that it is within the class of plaintiffs entitled to recover under [a] money-mandating source. . . ." Jan's Helicopter, 525 F.3d at 1307. A nonfrivolous assertion requires that (1) the statute, regulation, or constitutional provision asserted in the complaint can be fairly interpreted as mandating compensation by the Federal Government for damage sustained, and (2) that the source must be reasonably amenable to the reading that the plaintiff is within the class entitled to recover if all elements of the cause of action are established. Id.

for want of jurisdiction.'" Id. at 9-10 (quoting Litecubes, 523 F.3d at 1361).

Without a definitive brightline dictating the acceptable gender composition percentages under the EPA, plaintiffs have not filed a frivolous claim. Subject matter jurisdiction is determined independently of analyzing whether a plaintiff might ultimately succeed on the merits. Litecubes, 523 F.3d at 1360. A plaintiffs unsuccessful cause of action "'does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional *power* to adjudicate the case.'" Id. at 1361 (quoting Steel Co., 523 U.S at 89). The EPA is a money-mandating statute and is premised on disparate salaries based on gender. Alleging a violation of the EPA when the two groups are composed entirely of the same sex would be frivolous, complaining that wage disparity between two job classifications that have obvious differences in tasks would be frivolous, and filing a claim under the EPA for a job that pays identically to the preferred class would be frivolous. However, plaintiffs' complaint alleges a violation of the EPA relating to, at a minimum, two similar classifications that manifest approximately an 80% (female) to 20% gender breakdown in the lower-paid plaintiffs' class and approximately a 60% to 40% (female) gender breakdown in the higher-paid class. This cannot be considered frivolous under the standard in Jan's Helicopter.

II. Whether the EPA recognizes disparity that is based on groups reflecting a mixture of the two sexes

1. Summary judgment standards

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." RCFC 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The legal issues before the court may be resolved on summary judgment. Long Island Sav. Bank, FSB v. United States, 503 F.3d 1234, 1243-44 (Fed. Cir. 2007).

"The moving party in a summary judgment motion has the burden to show 'that there is an absence of evidence to support the nonmoving party's case.'" Crown Operations Int'l v. Solutia Inc., 289 F.3d 1367, 1377 (Fed. Cir. 2002) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).

2. Qualification under the EPA

Defendant argues that the EPA was not intended to address pay disparities in mixed gender groups when the gender diversity includes a "substantial" number of both men and women. Def.'s Br. filed Nov. 5, 2008, at 8.

Defendant offers three cases, Schulte v. New York, 533 F. Supp. 31, 38 (E.D.N.Y. 1981) (granting summary judgment when "there is such a

substantial representation of the 'minority sex' within each job classification . . . that even if [the two jobs] perform identical work, [the difference in pay] does not establish sex discrimination."); Hofmister, 53 F. Supp. 2d at 892 (granting summary judgment when lower-paid group was composed of ten men and nine women); Arthur, 174 F. Supp. 2d at 976 (finding that gender distributions of 47% male and 53% female lower-paid class versus 76% male and 24% female higher-paid class "undermines any suggestion that the difference in the benefits was based on sex," and ultimately entering summary judgment for defendant), for the proposition that the EPA does not equalize a pay differential when the two employment classifications contain "substantial" numbers of both men and women and that this case should therefore be decided at the summary judgement stage. See generally Def.'s Br. filed Nov. 5, 2008, at 11, 17. Defendant posits that, although complete diversity is not required, the difference between a "token" number of women and a "substantial" number negates coverage under the EPA and, hence, supports summary judgment for defendant. Id. at 16.

Plaintiffs respond that defendant misinterprets Hofmister and Schulte. Contrary to defendant's argument that Hofmister was decided based on gender make-up, plaintiffs state that the decisive element was that the two groups were not performing equal work. In the same vein, plaintiffs contend that defendant misrepresents Schulte to stand for dismissal based on gender balance, when education and training differences were the decisive factors.

Plaintiffs are correct that the precise holding in Hofmister was that the two groups did not perform equal work, but is incorrect that Hofmister does not support defendant's interpretation. Plaintiffs in Hofmister were two female Health Facility Surveyors for the State of Mississippi. Plaintiffs sued under the EPA alleging that they were paid less than male Nurse Practitioners. Plaintiffs' employment class was composed of ten men and nine women. The Nurse Practitioner group was composed of two men and eighteen women. The court in Hofmister awarded summary judgment for defendant primarily because plaintiffs had "failed to demonstrate that they perform work substantially equal to the male job comparators they have selected." 53 F. Supp. 2d at 889-90. The court then advanced an alternative holding5/ that, even if the work performed by the two groups had been equal, defendant would win on summary judgment because the EPA does not cover situations presenting two groups of mixed-gender employees. Id. at 891.

Plaintiffs are also correct that the Schulte court found that the two jobs being compared, social workers and psychologists, required different educational backgrounds and professional training. 533 F. Supp. at 38. Plaintiffs' assertion that this was

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5/ Not withstanding that a non-precedential holding from the United States District Court for the Southern District of Mississippi is not binding on this court, it still may be considered persuasive authority. See Co-Steel Raritan, Inc. v. Int'l Trade Comm., 357 F.3d 1294, 1307 (Fed. Cir. 2004) (explicating that dicta, while not precedential, can be persuasive, but not binding, authority).

the predominant reason for awarding summary judgment in the Government's favor is contradicted by the court's approach in Schulte. The court lucidly attributes equal, or greater, weight to gender composition versus educational background and professional training: "[T]he court places considerable emphasis upon the large number of social workers who are male (29%) and the large number of psychologists who are female (31%) . . . . Moreover, the educational background and professional training of psychologists and social workers differ." Id. The court continues to discuss the implications of mixed-gender groups and EPA actions, concluding that the EPA implementing regulation "indicates that the EPA was not intended to extend to claims by one group of employees that they are paid less than another group when each group includes significant numbers from each sex[.]" Id. at 39.

Plaintiffs offer additional support that groups composed of predominantly one sex are sufficient to state a prima facie case under the EPA. They quote the United States Supreme Court in Corning Glass and the United States Court of Appeals for the Sixth Circuit in Beck-Wilson, quoting Corning Glass, for the proposition that "agreeing to allow some women to work [for the higher-paid predominately male group] would frustrate, not serve, Congress' ends." Pls' Br. filed Dec. 2, 2008 at 13 (quoting Corning Glass, 417 U.S. at 208).

The EPA was established to protect against pay discrimination based on gender. Rep. Goodell, the "principal exponent" of the bill establishing the

EPA, County of Wash. v. Gunther, 452 U.S. 161 171 (1981), presented "examples and general guidelines as to the intent of Congress in enacting H.R. 6060, the equal-pay-for-women bill." 109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell). The third of fifteen reads: "Differences in pay between groups or categories of employees that contain both men and women within the group or category are not covered by" the EPA. Id.; see also Hofmister, 53 F. Supp. 2d at 892 n.13. Maintaining the spirit, and narrow focus of the EPA, the Corning Glass Court expanded the narrow scope of Rep. Goodell to frustrate avoidance of EPA liability by "agreeing to allow some women to work" in the higher-paid class in order to help protect groups from what would otherwise be a loophole in enforcement of the EPA and to avoid frustrating Congress' ends. 417 U.S. at 208. Whether the imprecise division between a point where courts should protect groups from being subjected to attempts to avoid EPA liability through a loophole and a point where employees are part of a mixed-gender group not covered by the EPA creates a contested issue of fact is the focus of the parties' arguments.

No judicial brightlines have been drawn for the minimum gender ratio that will defeat the protection afforded by the EPA. Defendant agues that a "substantial number" of men in the lower-paid class will defeat the EPA, while plaintiffs argue that a group "predominantly" made of one sex is sufficient to proceed past the summary judgment stage. Following trial, the court in Hofmister made the cogent observation that "'after a certain indefinable point, the integration within each of the classes

compared becomes such that any wage differential is clearly based on a factor other than sex.'" 54 F. Supp. 2d at 892 (quoting Peters, 818 F.2d at 1164). As the Schulte court on summary judgment described 29% male participation of the lower-paid class as being a "large number" and a female population of 31% in the higherpaid class as being a "large number," 533 F. Supp. at 38, this court finds that the numbers present in this case, 20% and 40% respectively, suffice to deny liability on summary judgment.

Plaintiffs' class, as of July 2008, is composed of essentially 80% females and 20% males, while the higher-paid PAs are 40% female and 60% male. This has been the approximate distribution since 2004. No suggestion is present, nor do plaintiffs allege, that the agency hired token men as NPs or token women as PAs to avoid a cause of action under the EPA. This court holds that the EPA does not contemplate mixed-gender groups consisting of a substantial 20% participation of the putatively preferred sex in the lower-paid category and a substantial 40% participation of the putatively disadvantaged sex in the higher-paid category. Any other approach to quantifying the ratio of females to males sponsors an application of the EPA to mixed groups. The record on summary judgment presents a situation of two job classifications staffed by both men and women with substantial participation of both sexes in each. The EPA was not intended to remedy such a diffuse situation; rather, the EPA addresses unequal pay when the groups are not mixed. Plaintiffs do not present that circumstance. Therefore, defendant's motion for summary judgment is granted.

CONCLUSION

Accordingly, based on the foregoing, defendant's motion to dismiss under RCFC 12(b)(1) is denied and defendant's motion for summary judgment under RCFC 56 is granted because plaintiffs do not qualify for coverage under the EPA. The Clerk of the Court shall enter judgment for defendant.

IT IS SO ORDERED.

No costs.

s/ Christine O.C. Miller
Christine Odell Cook Miller
Judge

[ENTERED: JANUARY 21, 2009]

In the United States Court of Federal Claims

No. 08-77 C

CONNIE E. YANT, ET AL.,

v. JUDGMENT

THE UNITED STATES

Pursuant to the court's Published Memorandum Opinion and Order, filed January 12, 2009, denying defendant's motion to dismiss under RCFC 12(b)(1), and granting defendant's motion for summary judgment under RCFC 56,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is in favor of defendant. No costs.

John S. Buckley
Acting Clerk of Court

January 21, 2009 By: Lisa L. Reyes

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

[ENTERED: JULY 10, 2006]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 04-4010

Filed: July 10, 2006

LAURA BECK-WILSON, et al.,
Plaintiffs-Appellants

v.

ANTHONY J. PRINCIPI,
Secretary of Veteran's Affairs,
Defendant-Appellee

MANDATE

Pursuant to the court's disposition that was filed 3/17/06 the mandate for this case hereby issues today. Reverse and Remanded

COSTS: None

A True Copy.

Filing Fee.....$
Printing.....$

Attest:

/s/ Deputy Clerk

Total.....$

[ENTERED MARCH 17, 2006]
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LAURA BECK-WILSON et al.,
Plaintiffs-Appellants,

v. No. 04-4010

ANTHONY PRINCIPI,
Secretary of Veterans Affairs,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.
No. 01-02265—Solomon Oliver, Jr., District Judge.

Argued: September 21, 2005

Decided and Filed: March 17, 2006

Before: DAUGHTREY, MOORE, and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: John F. Burke III, MANSOUR, GAVIN, GERLACK & MANOS CO., LPA, Cleveland, Ohio, for Appellants. Lynne H. Buck, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee. **ON BRIEF:** John F. Burke III, MANSOUR, GAVIN, GERLACK & MANOS CO., LPA, Cleveland, Ohio, for Appellants. Lynne H.

Buck, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. The plaintiffs are seventeen current and former nurse practitioners ("NPs") employed by the Department of Veterans Affairs ("VA") at the Cleveland Veterans Affairs Medical Center ("VAMC") in Brecksville, Ohio. The plaintiffs brought suit against the VA under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d) *et seq.*, alleging that, as predominantly female NPs, they are paid at a lower rate than the predominantly male physician assistants ("PAs") for performing jobs of equal skill, effort, and responsibility under similar working conditions. Plaintiff Laura Beck-Wilson also brought a wage-discrimination claim under Title VII, 42 U.S.C. § 2000e *et seq.* Although the district court held that plaintiffs had established a prima facie case of wage discrimination under the EPA, it granted summary judgment to the VA because it concluded that the VA had established its affirmative defense that "a factor other than sex," the separate statutory-based pay scales, was responsible for any sexually discriminatory difference in pay. We agree with the district court's conclusion that plaintiffs established a prima facie case under the EPA, but because we conclude that plaintiffs have raised a genuine issue of material fact regarding the reason for the pay differential between predominantly female NPs and predominantly male

PAs, we **REVERSE** the district court's grant of summary judgment to the defendant and **REMAND** for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

The Cleveland VAMC consists of two hospitals and thirteen clinics in northeast Ohio, and its facilities treat almost 82,000 veterans per year. Within the VAMC medical system, nurse practitioners and physician assistants are medical practitioners who provide care to veterans. Within the Cleveland VAMC, nurse practitioners are over 95% female, and physician assistants are over 85% male. NPs are registered nurses ("RNs") with advanced training and are required to have a master's degree. The VA's functional statement for an NP requires that a candidate be certified as a nurse practitioner by the American Nursing Association and be licensed by the state as a registered nurse. An outgrowth of the historically female-dominated profession of nursing, NPs have traditionally been female. PAs, in contrast, are not required to have a bachelor's or master's degree. PAs must have graduated from an approved allied health program, where they are trained in patient assessments, histories and physicals, treatments, and technical skills. The VA's functional statement for a PA requires a minimum of two years of working experience either as a PA or in a similar primary healthcare provider position. If hired after 1993, a PA must be certified by the National Commission of Certification of Physician Assistants. As a profession, PAs find their roots within the military, where they were historically trained in a technical

field to assist physicians. Traditionally PAs have been male.

NPs and PAs working at the VAMC (and other VA hospitals) are compensated according to Congressionally-determined pay scales, codified in two different statutory frameworks. NPs and other nurses are paid on a nursing pay scale, as outlined by the Nurse Pay Act of 1990, 38 U.S.C. § 7451. The Nurse Pay Act creates a nurse locality pay system, which ensures that the VA is not a pay leader in a given local market, but that its nurses are paid competitively. 38 U.S.C. § 7451(d)(3)(E). The system contains five grade levels (Nurse I - Nurse V) and a range of basic pay for each. In order to maintain competitive pay for VA nurses, the Nurse Pay Act authorizes facility directors to adjust rates of pay for covered positions to amounts comparable to the corresponding non-VA positions in the local labor market, so long as adjustments do not exceed the highest beginning rates for corresponding non-VA positions. A nurse's starting salary is determined by the Nursing Professional Standards Board ("NPSB"), and a nurse or supervisor can later request that the NPSB adjust an individual's placement on the pay scale to reflect a promotion or higher educational degree. Most NPs at the Cleveland VAMC are categorized as Nurse III on the locality pay system, which as of 2002 meant a top pay rate of $75,871 annually. Some NPs are categorized at the lower Nurse II rate, which in 2002 had a top pay rate of $64,600 annually.

PAs are paid according to the General Schedule ("GS") pay scale established in 38 U.S.C. § 7404. Each PA is classified as Associate, Full, Intermediate, Senior, or Chief pay grades, depending upon that individual's education, experience, and assignment complexity. A PA's starting pay is determined by the Medical Professional Standards Board ("MPSB") based upon experience, qualifications, and credentials. The MPSB also considers subsequent special adjustments based upon a PA's experience and advancement. Assuming their performance is satisfactory, both NPs and PAs receive regular step increases within their pay grade and cost of living adjustments as authorized by Congress.

Congress has enacted several statutory provisions that afford VA officials the discretion to increase the rate of pay for VA health care professionals when necessary. Under Title 38, the Secretary of Veterans Affairs may increase the basic pay of VA health-care personnel[1] where necessary to provide competitive pay, achieve adequate staffing, and to recruit personnel with specialized skills, particularly those who hold skills that are especially difficult or demanding. 38 U.S.C. § 7455(b). The Nurse Pay Act also includes a provision that authorizes the VA to increase the rate of pay for nurses as needed. While normally the maximum rate of basic pay for a grade is 133 percent of the

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[1] The VA Handbook states that above-minimum entrance rate and special salary ranges apply to nurses and physician assistants. Joint Appendix ("J.A.") at 353 (VA Handbook 5103.9, MP-5, Part II, Chapter 3, 3D-1).

minimum rate of basic pay for that grade, 38 U.S.C. § 7451(c)(1) states that "if the Secretary determines that a higher maximum [pay] rate is necessary with respect to any . . . grade in order to recruit and retain a sufficient number of high-quality health-care personnel, the Secretary may" increase the pay up to a maximum ratio of 175 percent.

In 1990, the Cleveland VAMC adopted a special pay scale for PAs because it was having problems recruiting local candidates for entry-level PA positions. PAs working at the VAMC have continued to receive pay at this special scale since 1990, despite the fact that there has not been a recruitment or retention problem for PAs in recent memory. William Montague, the current director of the Cleveland VAMC, testified that the VAMC has not experienced any difficulty recruiting or retaining PAs since his tenure began in 1997. Nevertheless, Montague has continued to certify to the VA that it remains necessary to pay PAs on an increased pay scale in order to ensure adequate staffing and competitive pay.

In 1999, plaintiff Laura Beck-Wilson learned that her colleague Greg McDonald, a PA, was earning more money for performing the same duties than she did in her role as an NP. Beck-Wilson and McDonald worked side-by-side, and like other NPs and PAs at the VAMC, often covered for one another while on the job. Beck-Wilson found this pay differential particularly disturbing because she and another NP had actually trained McDonald to do his job at the VAMC. Beck-Wilson sought redress within her chain of command; she went before her superiors

asking that as an NP she be paid at a rate equivalent to a PA, and cited evidence that other VA facilities had special pay scales for NPs that accomplished wage parity between the two positions. When she brought her complaint to Director Montague, he stated that "he was not here to cure the social ills of society," Joint Appendix ("J.A.") at 189 (Beck-Wilson Dep. at 206); J.A. 427 (Montague Dep. at 39) (recalling conversation and stating he does not deny using similar phrase), but that Beck-Wilson was a nurse, and that was why the pay difference existed. In August 1999, Beck-Wilson filed an administrative complaint with the EEOC, arguing that the pay differential between PAs and NPs violated the EPA. An evidentiary hearing was held in 2000, and in June 2001, an administrative law judge rejected Beck-Wilson's claim, stating that she had not established a prima facie case under the EPA.

In September 2001, Beck-Wilson and eighteen other NPs filed this suit alleging violations of the EPA and Title VII. Plaintiffs allege that they are predominantly female whereas PAs are predominantly male, that as NPs they perform jobs of equal skill, effort, and responsibility as PAs, that as NPs they are higher educated and have received more training than PAs, and that they are paid less than PAs. Plaintiffs argue that the VA's decision to continue paying PAs on the special pay scale while at the same time refusing to create a special pay scale for NPs has resulted in illegal wage discrimination. Even though PAs perform substantially equal work to NPs, defendants pay them on a special pay scale which plaintiffs allege

enables PAs to earn up to $10,000 more per year than similarly situated NPs. Plaintiffs point to VA employee Mary Knowles, who is both an NP and a PA, but who chooses not to invoke her greater educational qualifications as an NP because under the existing pay schemes she earns more money working as a PA.

The VA answered the complaint and filed a motion to dismiss in June 2002. In September 2002, the district court denied defendant's motion to dismiss, and discovery ensued. In October 2003, the VA filed a motion for summary judgment, and in November 2003, plaintiffs filed a motion to strike portions of the VA's memorandum in support of its motion for summary judgment as well as an opposition to defendant's summary judgment motion. On June 9, 2004, the district court issued an order requesting information from the parties about the special pay rate for PAs. The district court was concerned that the VA's contention that it could place the NPs on a special salary scale only if a recruitment and retention problem existed was a pretext for sex discrimination. The parties filed supplemental briefs on the issue. On July 14, 2004 the district court granted the VA's motion for summary judgment, denied the plaintiffs' motion to strike, and entered judgment for the VA. The district court held that the plaintiffs had established a prima facie violation of the EPA, and proceeded to consider whether the VA had proven any of its asserted affirmative defenses.

In its motion for summary judgment, the VA contended that the two separate statutory-based pay scales, not sex, was the cause of any pay differences between the NPs and PAs at the VAMC. The VA argued that these separate pay scales meet three of the four affirmative defenses under the EPA: a seniority system, a merit system, and "any other factor other than sex." *See* 29 U.S.C. § 206(d)(1). The district court agreed that the different pay scales constituted a factor other than sex.[2] Finding that an affirmative defense had been proven such that no genuine issue of material fact remained, the district court granted summary judgment for the VA on both the EPA and Title VII claims. Seventeen of the plaintiffs then filed a timely appeal.

II. ANALYSIS

We review de novo a district court's grant of summary judgment, and affirm "only if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Cotter v. Ajilon Servs., Inc.*, 287 F.3d 593, 597 (6th Cir. 2002). In order for a factual dispute to be genuine, the evidence must be such that "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it relates to a disputed matter "that might affect the outcome of the suit." *Id.* Summary judgment is appropriate "if the pleadings,

[2] Because the district court concluded that the pay scales met the affirmative defense of "any other factor other than sex," it did not consider whether the pay scales were valid seniority or merit systems.

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

A. Plaintiffs' Equal Pay Act Claims

1. Plaintiffs' Prima Facie Case Under the EPA

The EPA prohibits employers from paying an employee at a rate less than that paid to an employee of the opposite sex for performing equal work. *See* 29 U.S.C. § 206(d)(1). In order to establish a prima facie case of wage discrimination under the EPA, plaintiffs must show that an employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (quoting 29 U.S.C. § 206(d)(1)). Jobs need not be identical in order to be considered "equal work" under the EPA. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265, & n.10 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970). Whether a job is substantially equal for purposes of the EPA is determined on a case-by case basis and "resolved by an overall comparison of the work, not its individual segments." *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981) (orderlies and nurses aides perform substantially equal work).

"Unlike the showing required under Title VII's disparate treatment theory, proof of discriminatory intent is not required to establish a prima facie case under the Equal Pay Act." *Peters v. City of Shreveport*, 818 F.2d 1148, 1153 (5th Cir.), *cert. denied*, 485 U.S. 930 (1988), *abrogated on other grounds, Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). "Once the plaintiff establishes a prima facie case, the defendant must 'prove' that the wage differential is justified under one of the four affirmative defenses set forth under § 206(d)(1) of the Equal Pay Act: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) any other factor other than sex." *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 799 (6th Cir. 1998) (citing *Corning Glass Works*, 417 U.S. at 196). Because these are affirmative defenses, the defendant bears the burden of proof. *See Corning Glass Works*, 417 U.S. at 197; *see also EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 988 (6th Cir. 1992). The burden shifting under the EPA differs from the Title VII framework, in which a "defendant need only assert a legitimate, non-discriminatory reason for the different treatment afforded the plaintiff as compared to her similarly situated male co-workers," *Buntin*, 134 F.3d at 799 n.6, at which point the burden shifts back to the plaintiff to show pretext. Under the EPA, however, the plaintiff "never bears the burden of *persuasion* regarding the affirmative defenses." *Id.* at 800 n.7.

The district court concluded that plaintiffs had established a prima facie case of wage discrimination in violation of the EPA because they

presented sufficient evidence such that a reasonable jury could conclude that the positions of NP and PA were fungible at the Cleveland VAMC, and that a PA performing substantially equal duties as an NP would earn more money. The VA argues that the district court erred in this conclusion, and urges us to affirm the district court's grant of summary judgment on the ground that plaintiffs cannot demonstrate a prima facie EPA case. The VA's attack on plaintiffs prima facie case is two-pronged. First, the VA argues that NPs and PAs do not perform substantially equal work, and second, that plaintiffs have not identified appropriate male comparators that earn more. After carefully analyzing the parties' arguments and the record, we affirm the district court's conclusion that plaintiffs have met their prima facie burden.

The district court properly rejected the VA's argument that the jobs of NPs and PAs are not substantially equal because NPs possess *greater* education and skill. While "differences in skill, effort, or responsibility . . . might be sufficient to justify a finding that two jobs are not equal . . . if the greater skill, effort, or responsibility has been required of the higher paid sex, [such differences] do not justify such a finding where the greater skill, effort, or responsibility is required of the lower paid sex." 29 C.F.R. § 1620.14(a). The VA's argument that PAs and NPs do not perform substantially equal work is also belied by the record, which compels the conclusion that the two positions are fungible at the Cleveland VAMC. We agree with the Court of Federal Claims that evidence that the positions being compared are fungible can support a prima

facie case under the EPA. *Allison v. U.S.*, 39 Fed. Cl. 471, 475 (Fed. Cl. 1997) (finding that plaintiffs had established a prima facie case because the VA advertised for either NPs or PAs to fill open positions and the Chief NP for one section had authored a memo to the VA's Chief of Staff stating that the two groups had similar responsibilities). Although the VA repeatedly asserts in its brief that the positions at the Cleveland VAMC are not substantially equal, there is undisputed evidence in the record that the defendant considers the positions to be fungible.

In his testimony before the administrative law judge, Dr. Ted Parran, the Medical Director of the Veterans Addiction Recovery Center, explained that he works with and supervises both NPs and PAs. He agreed that the two jobs involve similar skill, effort, and responsibility, and explained that when a position is open it is advertised as a middle level practitioner to be filled either by an NP or a PA. When looking to fill these practitioner positions, Parran stated, "[W]e don't consider whether it's a Physicians Assistant or a Nurse Practitioner as an issue of qualification." J.A. at 458 (Parran Test. at 103).

In addition to Dr. Parran, several other VAMC employees other than plaintiffs also testified that for hiring purposes, the Cleveland VAMC regards NPs and PAs as fungible. Sondra Marcum, Chief Nurse Executive and Associate Director for Patient and Nursing Services, testified that the basic duties of both jobs at the VAMC can be performed by either NPs or PAs. The Cleveland VAMC, like the

Portland Veteran's Facility involved in *Allison*, advertised open positions as seeking either an NP or a PA. *Allison*, 39 Fed. Cl. at 475. Rebecca Everett, Human Resources Specialist at the Cleveland VAMC, testified that most of the vacancy announcements that she has posted have stated that the position could be filled by either a PA or an NP. Everett agreed that NP Beck-Wilson and PA McDonald were doing the identical job. Furthermore, based upon her conversations with VAMC managers, Everett's understanding of the two positions at the VAMC is that "either profession can do what is typically done by most physician's assistants and nurse practitioners." J.A. at 438 (Everett Dep. at 15).

Judy Trepkowski, a VAMC Human Resources Specialist, stated that at no time in her current position could she recall a job listing that was specifically for an NP or a PA, rather than both. Trepkowski testified that at the VAMC, NPs and PAs have similar skills and perform similar functions. Hiring of NPs and PAs is "an interdisciplinary situation where a person from either background would be acceptable to do the work at that time." J.A. at 419 (Trepkowski Dep. at 16). When the VA is interested "in having a person who has a broader educational background and a broader basis," a job posting may specifically request that applicants be NPs. J.A. at 684 (Marcum Dep. at 31).

Despite this overwhelming evidence that the Cleveland VAMC employed NPs and Pas interchangeably, the VA cites *Beall v. Curtis*, 603 F. Supp. 1563 (M.D. Ga. 1985), to support its claim that

NPs and PAs do not perform substantially equal work at the VAMC. In *Beall*, an EPA claim brought by NPs was rejected on the ground that the plaintiffs failed to establish that their jobs as NPs were substantially equal to a more recently hired and higher-paid male PA. In that case, however, the PA being paid a higher wage possessed certain skills that the NPs did not, particularly in the area of management of trauma, and his experience with trauma meant that he had different job duties and greater responsibilities than the plaintiffs in that he could take night call in rotation with physicians. *Id.* at 1571-73. The VA, however, has never argued nor has it presented any evidence to suggest that PAs have different duties or more responsibility than do NPs within the Cleveland VAMC, and the VA conceded at oral argument that there is nothing that a PA can do that an NP cannot do. On the contrary, NPs are more highly educated, and discovery produced compelling evidence that NPs and PAs perform similar jobs at the VAMC. The district court's conclusion that plaintiffs established that NPs and PAs at the VAMC perform substantially equal work was proper.

Next, the VA argues that plaintiffs cannot identify appropriate male comparators who are paid more, which the VA claims is fatal to plaintiffs' prima facie case. The VA asserts that complete gender diversity is needed between the comparison classes to satisfy the prima-facie-case requirements and thus, because approximately 5% of NPs are male and 15% of PAs are female, the plaintiffs have failed in their obligation to show an appropriate male comparator. Citing *CorningGlass Works*, 417 U.S. at

208, which stated that a few women among the higher paid groups did not negate an EPA claim, the district court correctly rejected this argument and determined that whether a policy affects both male and female employees to such an extent that an EPA claim would be invalid is a question of fact. We agree that complete diversity between plaintiffs and comparators is not required to state a prima facie case under the EPA. As the Supreme Court stated in *Corning Glass Works*, "To permit [a] company to escape that [equal pay] obligation by agreeing to allow some women to work [in the male dominated position] at a higher rate of pay as vacancies occurred would frustrate, not serve, Congress' ends." *Id.* at 208; *see also Allison*, 39 Fed. Cl. at 473 (holding that a group of "predominantly female" NPs at the Portland, Oregon VA produced evidence that they performed substantially equal work as the "predominantly male" PAs for less pay in violation of the EPA); *Peters*, 818 F.2d at 1164 (holding that the text of the EPA does not require "near-perfect diversity between the classes"); *Arthur v. College of St. Benedict*, 174 F. Supp. 2d 968, 976 (D. Minn. 2001) (stating that the EPA "does not require perfect diversity between the comparison classes," but when the challenged policy affects both men and women equally, "there can be no EPA violation"). The fact that a small minority of the VAMC PAs are female and a small minority of NPs are male is not fatal to plaintiffs' EPA claim.

The VA also argues that plaintiffs' attempts to identify male comparators who earn more money for doing substantially equal work are insufficient. The district court rejected this claim, citing the

undisputed testimony by numerous VA employees that NPs and PAs are interchangeable and the plaintiffs' statistical evidence that PAs are paid more than NPs for performing the same duties. Plaintiffs have presented two types of comparator evidence: (1) an individual comparator for each plaintiff; and (2) statistical evidence of classification-based pay disparities between NPs and PAs and as well as evidence that women receive lower compensation than do men for each year of additional experience under the existing pay scales. We now consider whether this comparator evidence is adequate to meet plaintiffs' prima facie burden.

In determining whether a comparator is appropriate for the purposes of an EPA claim, our focus is on actual job requirements and duties, rather than job classifications or titles. *See Brennan v. Owensboro-Daviess County Hosp.*, 523 F.2d 1013, 1017 & n.7 (6th Cir. 1975). "A plaintiff establishes a prima facie [EPA] case by comparing the jobs held by the female and male employees, and by showing that those jobs are substantially equal, not by comparing the skills and qualifications of the individual employees holding those jobs." *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992) (citation omitted). Because the comparison at the prima facie stage is of the jobs and not the employees, "only the skills and qualifications actually needed to perform the jobs are considered." *Id.* Factors like education and experience are considered as a defense to an employer's liability rather than as part of a plaintiff's prima facie case. *Id.* at 1533 n.18 (citation omitted).

Each of the plaintiffs has identified a specific male PA who she alleges is performing substantially equal work but who is receiving higher pay for his work. Appellant Br. at 42-46. Although one plaintiff (who happens to be male) receives only $600 less than his PA counterpart, the disparity is significantly higher for all the other plaintiffs, with several earning over $10,000 less per year than her comparator male PA. The VA asserts that these comparators are inappropriate, and suggests ways in which several of the male comparator employees may differ from plaintiffs. The VA claims that in selecting their comparators, plaintiffs have not adequately accounted for employees' duties, carelines, departments, or years of experience in current position. The VA improperly focuses upon alleged differences between employees, rather than the jobs they perform, and also overstates the plaintiffs' burden of showing a higher-paid comparator at the prima facie stage. "The text of the EPA may not be brushed with such a demanding gloss" as to suggest that plaintiffs' prima facie case fails because each one has not identified "one specific individual who constitutes a *perfect* male comparator." *Wheatley v. Wicomico County*, 390 F.3d 328, 334 (4th Cir. 2004) (emphasis added). Moreover, whether two positions are substantially equal for EPA purposes is a question of fact for the jury. *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1311 (2d Cir. 1995) ("[I]t is for the trier of fact to decide if [there] is a significant enough difference in responsibility to make the jobs unequal."), *abrogated on other grounds, Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). When we compare the jobs performed by NPs and PAs, we conclude that the district court was correct in

holding that plaintiffs have identified more highly paid male comparators. The record does not suggest that the comparator PAs hold jobs that require different skills or qualifications, but on the contrary, the VA's own employees agree that the duties of the two positions are interchangeable.

In addition to identifying male comparators, plaintiffs have also produced statistical evidence that the predominantly male PAs are paid more than the predominantly female plaintiffs for performing substantially equal work. Dr. Rosen, the plaintiffs' statistical expert, concluded that VAMC PAs are paid an amount that is statistically significantly higher than what is paid to NPs, and that this pay disparity cannot be explained by working experience either within the VA or outside or by differences in educational attainment. Despite the fact that the VAMC NPs are better educated than their PA counterparts, the PAs earn on average $4,655 per year more than NPs at the VAMC. According to Rosen, this pay disparity is in contrast to a survey of salaries paid in the Cleveland area, which indicates that NPs are typically paid more than PAs. The pay disparity between NPs and PAs is even greater at the upper ends of the pay scale, with the top rates for PAs in 2002 being some $9,336 more than the top rates for NPs. Thus, under the existing pay scheme, with PAs receiving pay under a special GS pay scale and NPs receiving pay under the standard Nursing Pay Scale, female employees are not being compensated in the same way as their male counterparts for each additional year of

experience.[3] Rosen concluded that the VA's current pay scheme is economically discriminatory against the predominantly female NPs.

The VA argues that it was improper for the district court judge to consider this class-wide statistical analysis as evidence of a prima facie EPA violation. We disagree, and we affirm the district court's conclusion that this statistical evidence of a gender-based disparity in pay supports plaintiffs' prima facie case. We have previously held that an EPA plaintiff can rely upon statistical evidence of a gender-based disparity in pay when establishing a prima facie EPA case. *See Kovacevich v. Kent State Univ.*, 224 F.3d 806, 828 (6th Cir. 2000) (considering plaintiff's statistical research showing gender-based disparities in merit awards and top salary-earners

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[3] Rosen's regression analysis of gender and experience as factors in NP and PA pay also indicates a gender-salient difference in how experience is compensated at the VAMC. Rosen compared a "total experience" analysis of how each additional year of experience as an NP or a PA is compensated with a "gender experience" analysis of what increased compensation each year of additional experience produced for women NPs and PAs. The total experience regression (average of men and women NPs and PAs) suggested that each year of additional experience would result in $562.47 of additional compensation. J.A. at 415-16 (Rosen Dep. at 129-135). In comparison, however, Rosen's gender experience regression (comparing men and women regardless of whether they are an NP or a PA) indicated that under the existing pay scheme, each additional year of experience for a woman results in smaller pay increases than for their male counterparts. Rosen concluded that "on average, if you're a woman each year of experience has been compensated by $179 less." J.A. at 416 (Rosen Dep. at 134).

as part of the "combination of evidence" that created a genuine issue of material fact on plaintiffs EPA claim). Applying *Kovacevich* to this case, we hold that plaintiffs properly presented statistical evidence of a gender-based pay disparity in conjunction with individual comparator evidence in order to meet their prima facie burden. *See also Lavin-McEleney v. Marist College*, 239 F.3d 476, 481 (2d Cir. 2001) (holding that plaintiff, who identified a specific male comparator, can also compare herself to a statistical composite of comparable male employees in order to establish EPA liability as well as to calculate damages).

The VA has not presented any evidence to show that the jobs performed by the comparator PAs differ in content to those performed by plaintiffs. Instead, the record before us indicates that an overall comparison of the work of NPs and PAs, as attested to by the VA's own human resources and supervisory personnel, is substantially equal. We must "believe the evidence presented by the nonmovant[s], and draw all justifiable interferences in [their] favor." *Cotter*, 287 F.3d at 597 (citing *Plant v. Morton Int'l, Inc.*, 212 F.3d 929, 933-34 (6th Cir. 2000)).

As the movant for summary judgment, the VA has failed to show that a reasonable juror could not find that plaintiffs established their prima facie case. *Buntin*, 134 F.3d at 798. The district court's conclusion that a reasonable jury could determine that the positions of NP and PA at the Cleveland VAMC were fungible and that a PA performing substantially the same duties as an NP would earn

more money is sound. We affirm the district court's holding that plaintiffs have established a prima facie EPA violation.

2. Defendant's Affirmative Defense of A "Factor Other Than Sex"

Once a plaintiff establishes a prima facie EPA violation, a defendant bears both the burden of persuasion and production on its affirmative defenses. *See Buntin*, 134 F.3d at 800 n.7 (stating that an EPA defendant always bears the burden of persuasion regarding the affirmative defenses, and that a "plaintiff bears the burden of *producing* evidence of pretext solely where a reasonable jury viewing the defendant's evidence could find only for the defendant" on the issue of the affirmative defense); *see also EEOC v. Delaware Dep't of Health and Soc. Servs.*, 865 F.2d 1408, 1415 (3d Cir. 1989) (stating that a defendant has "the burden of persuasion, not merely the burden of production, on [its] affirmative defense"). "The Equal Pay Act was intended as a 'broad charter of women's rights in the economic field [and] sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.'" *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029 (6th Cir. 1983) (quoting *Shultz v. American Can Co.-Dixie Prods.*, 424 F.2d 356, 360 (8th Cir. 1970)). "The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying

purposes which Congress sought to achieve." *Corning Glass Works*, 417 U.S. at 208.

We have therefore held that the Equal Pay Act's exception that a factor other than sex can be an affirmative defense "does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason." *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988) (quotation omitted). "[T]he burden of proving that a factor other than sex is the basis for a wage differential is a heavy one." *Brennan*, 523 F.2d at 1031. "[U]nless the factor of sex provides *no* part of the basis for the wage differential, the requirements [for the defense] are not met." *Id.* (emphasis added) (quotation omitted). In order "to survive [a] defendant's motion for [summary judgment], the EPA plaintiff need not set forth evidence from which a jury could infer that the employer's proffered reason for the wage differential is pretextual." *Buntin*, 134 F.3d at 799. Rather, as the party who bears the burden of persuasion, the defendant who makes a motion [under Rule 56(c)] must demonstrate that there is no genuine issue as to whether the difference in pay is due to a factor other than sex. *Id.* at 799-800 (citing *EEOC v. Romeo*, 976 F.2d at 989). Thus the district court's grant of the VA's motion for summary judgment can be upheld "only if the record shows that [the VA] established the defense so clearly that no rational jury could have found to the contrary." *Id.* at 800 (quotation omitted).

The district court held that the distinct salary programs that govern the pay of NPs and Pas was a

factor other than sex, and that the VA had met its burden of proof on this defense with such compelling evidence that no genuine issues of material fact remained. We do not agree that the VA has established this defense so clearly. Because we conclude that the VA has failed to demonstrate that there is no genuine issue of material fact about whether a factor other than sex produced the pay differential between PAs and NPs, we reverse the district court's grant of summary judgment to the VA.

The VA urges us to apply precedent from other courts that have held that a distinct salary program can serve as a "factor other than sex" defense to an EPA claim where the individual receiving the higher salary under the salary program has appropriate background and experience to explain the pay differential. In these cases, the "factor other than sex" defense established has been a sort of hybrid between the seniority and merit defenses. In these instances, the more highly-paid male employee was found to have greater experience or qualifications for the job, or to hold greater job responsibilities. The VA has not demonstrated that such differences between PAs and NPs exist at the Cleveland VAMC.

In *EEOC v. Aetna Ins. Co.*, 616 F.2d 719 (4th Cir. 1980), the Fourth Circuit held that Aetna's decision to pay a newly hired male insurance underwriter more than existing female underwriters "was attributable to the existence of two distinct salary programs" and "was explained by [his] experience and background, two considerations

which were not sex-linked." *Id.* at 726. Similarly, in *Girdis v. EEOC*, 688 F. Supp. 40 (D. Mass. 1987), the district court found no EPA violation where a male EEOC employee received higher pay than female employees due to the "good faith operation of *bona fide*, gender-neutral, acceptable government employment programs" and the court determined that the higher-paid male "*was qualified for his higher salary by his experience and background.*" *Id.* at 46-47 (emphasis added). In this case, however, the VA cannot claim, based on the record before us, that the experience and background of PAs qualify them to receive higher pay than NPs with equivalent years of medical experience. The VA's reliance upon *Aldrich v. Randolph Central School District*, 963 F.2d 520 (2d Cir. 1981), is also misplaced. In *Aldrich*, the Second Circuit held that "a job classification system [could] serve as a factor-other-than-sex defense to sex-based wage discrimination claims only when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue." *Id.* at 525. The testimony of numerous VA employees other than plaintiffs, however, suggests that no business-related differences in work responsibilities exist, and that the two positions are fungible.

While we decline to entertain the VA's arguments about alleged differences in experience between higher-paid PA employees and plaintiffs at the prima facie stage, we now consider those arguments at the affirmative defense stage. The VA suggests that some PAs may receive higher pay than

NPs with similar years of overall medical experience because the PAs have more years of service in the specific position of PA than do the lesser-paid plaintiff NPs as NPs, given that many of the NPs practiced as RNs before obtaining their master's degree and NP certification. The VA's contention that position-specific experience (rather than all relevant nursing or medical experience) justifies paying PAs more despite the undisputed testimony that their work is fungible with the work of NPs and that PAs do not fulfill any job responsibilities that NPs cannot perform raises a genuine issue of material fact that a jury should decide. In order to prevail on summary judgment on this issue, the VA would have to establish that no reasonable jury could find that an NP's prior nursing experience rendered her equally qualified as a PA who had served in that role for the same length of time. The VA cannot meet this heavy burden at this stage of the case. On the contrary, the greater educational requirements for NPs suggests that such an NP would have experience and background at least equivalent to, if not superior than, a PA with similar years of PA experience.

The VA's argument that the two Congressionally-mandated pay scales for NPs and PAs is a "factor other than sex" that is responsible for any existing pay differential is at its core an argument that within these pay scales the VA lacks the authority to correct any pay differential between the two professions. The plaintiffs argue that the VA's failure to issue a special salary rate for NPs at the Cleveland VAMC while at the same time insisting that the special rate for the PAs must

continue results in sexually discriminatory pay differences in violation of the EPA. The VA's response is, in essence, that its hands are tied by the statutory-based pay framework and thus that the VA must continue the status quo pay scheme for the two positions, despite any sexually discriminatory pay differential. First, the VA argues that it must continue to pay PAs under the increased special pay scale. Second, the VA claims that it lacks the authority to place the NPs under a similar increased special pay scale because there is no recruitment or retention problem for NPs. We find both arguments to be unsupported by the record. The VA's argument confuses its obligation to pay NPs and PAs within the Congressionally-mandated frameworks with an obligation to maintain the status quo application of those pay frameworks.

On the first point, the VA contends that it must maintain the special pay rate for the PAs to ensure competitive pay and adequate staffing of PAs despite no longer having a recruitment or retention problem. Cleveland VAMC Director Montague declared that, "If I would not certify this fact [that it was necessary to pay the PAs on the special pay scale], the PAs would receive pay cuts which would result in retention issues for current employees." J.A. at 590 (Montague Decl., June 16, 2004); Appellee Br. at 16 ("Absent this annual certification, currently employed VAMC Pas would receive pay cuts."). The district court accepted this argument, and stated that the plaintiffs had not presented any evidence to rebut this showing. The record, however, does contain evidence to rebut this claim, and therefore the district court erred in accepting the

defendant's assertion that it could not eliminate the special pay scale for PAs without causing a reduction in PA pay to current employees. The VA Handbook, submitted by the VA as Exhibit N attached to its motion for summary judgment, expressly speaks to Director Montague's concern that existing PAs would receive a reduction in salary upon the termination of a special pay scale, and appears to mandate that such a reduction *must not* occur. The VA Handbook states that "[a]n employee's rate of basic pay shall not be reduced as a result of a reduced or discontinued . . . special salary rate range." J.A. at 358 (VA Handbook 5103.9, MP-5, Part II, Chapter 3, 3D-6) (stating that if such special rates are reduced or terminated, the employee "shall be placed in the lowest step rate of the applicable rate range which does not result in a reduction of the employee's basic rate of pay"). A reasonable jury could conclude the VA's argument that it must continue to pay the predominantly-male PAs on a special pay scale is pretextual.

On the second point, the VA claims that it lacks the authority to place NPs on a special pay scale. The district court also relied upon this claim in granting summary judgment to the VA. The district court found that a factor other than sex was responsible for the pay differential "with the caveat that the VA be able to establish that it *does not* have the authority to place NPs on a special salary schedule, as [p]laintiffs claim they should be." J.A. 637 (Order at 18) (emphasis added). We do not agree that the VA's claim that its "inability to implement a separate pay scale for NPs" is a valid "factor other than sex" defense. Appellee Br. at 33. The record

suggests that the VA does have the authority to place the NPs on an increased special pay scale, and that such authority could be appropriately exercised because evidence does suggest a recruitment and retention problem exists for NPs.

The plain language of two different statutory provisions authorizes the defendant to create a special pay scale for NPs. *See Allison*, 39 Fed. Cl. at 476. Section 7451(c)(1) of the Nurse Pay Act enables the VA to raise the maximum pay at a particular grade to 175 percent of the minimum in order to recruit and retain a sufficient number of high-quality health-care personnel. Additionally, the VA agrees that it has the authority to create a special, increased pay scale for NPs under 38 U.S.C. § 7455.[4] Director Montague admits that he can authorize a special NP pay scale but that he has not done so because he does not believe the VAMC has a recruitment or retention problem with NPs. The VA argues that its authority to increase NP pay "is expressly limited to instances where there is a documented recruitment and retention problem in a particular job classification in a particular local market." Appellee Br. at 29. The VA then argues that there are no problems with recruiting or

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[4] § 7455 states that increases in basic pay may be made "(1) to provide pay in an amount competitive with, but not exceeding, the amount . . . paid to the same category of personnel at non-Federal facilities in the same labor market; (2) to achieve adequate staffing at particular facilities; or (3) to recruit personnel with specialized skills, especially those with skills which are especially difficult or demanding." 38 U.S.C. § 7455(b)(1)-(3).

retention of NPs at the Cleveland VAMC, and therefore it cannot raise the pay for NPs.

The only evidence that the VA offers to support its contention that the Cleveland VAMC does not have a recruiting or retention problem is the statement of Director Montague. Montague stated that during his tenure, the Cleveland VAMC has not had difficulties recruiting and retaining NPs and PAs "and has, in fact, paid for many of its RNs to obtain advanced practice degrees or their NP education and certification." J.A. at 591 (Montague Decl., June 16, 2004); J.A. at 362 (Montague Decl., Oct. 7, 2003). Both the VA and the district court viewed the practice of paying for existing RNs to become NPs as evidence that the Cleveland VAMC *does not* have any recruiting or retention problems for NPs. However, we believe that a reasonable jury could interpret this practice as evidence that the VA *does* have a problem recruiting NPs, such that it must absorb the cost of its employees obtaining their advanced degrees and NP certifications in order to meet its NP staffing needs. That the VA has had the practice of paying for RNs to become NPs despite the fact that the VAMC "has had a severe shortage of . . . registered nurses" in the past suggests a significant need for NPs that is not being filled by qualified candidates in the job market. J.A. at 362 (Montague Decl., Oct. 7, 2003). If there were available NPs in the job market, it would make more sense for the VA to hire them instead of paying the additional costs for its RNs to become NPs, thereby creating a need to replace those promoted to NP with more hard-to-find RNs. A reasonable jury could conclude that the VA has an NP recruitment problem.

Although they do not bear the burden of persuasion (or even production) on this recruitment and retention issue, the plaintiffs have offered evidence to rebut the VA's claim that no recruitment or retention problem exists. Dr. Parran stated that he knows of at least three NPs who left the VA since 1995 for jobs in private practice. In her 2000 testimony before the ALJ, Chief Nurse Marcum testified that in the two previous years, four NPs had resigned. In the eight years prior to her ALJ testimony (1992-2000), fifteen NPs had resigned, which was a rate of about two per year.[5] J.A. at 473 (Marcum Test. at 302). The VA stipulated during oral argument that there are approximately thirty PAs and thirty-two NPs currently employed by the VAMC. A reasonable jury could conclude that the VA has an NP retention problem.

Additionally, plaintiff Judith Karg also testified that she quit her job with the Cleveland VAMC and accepted an NP job at the Tucson, Arizona, VA facility because she will earn more money as an NP there. The Tucson VA facility does have a separate pay scale for NPs. Finally, plaintiff Laura Beck-Wilson testified that former VAMC NP Jeannette DiChiro took a position at another VA facility in Las Vegas because they had a separate pay scale for nurses, and DiChiro was therefore able to receive a significant increase in pay. Beck-Wilson also testified that she resigned from her position as clinic coordinator, an additional administrative role

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[5] Marcum stated that she had not reviewed the reasons for those NP resignations. J.A. at 473 (Marcum Test. at 302).

that she had previously assumed, because she was being paid less than a PA for performing the same duties.

The evidence of numerous NP resignations and the practice of paying for RNs to become NPs to satisfy its need for NPs raise a genuine issue as to whether the VA has a recruitment and retention problem for NPs. A reasonable jury could find that the VA has the ability to exercise its authority under the relevant statutes to increase the pay for NPs. Given that the VA has refused to issue a special salary pay scale for the NPs at the VAMC at the same time that it has insisted upon extending the special salary pay scale for the PAs, a reasonable jury could conclude that the VA's contention that the pay scales are responsible for the existing pay differential between NPs and PAs at the Cleveland VAMC is a pretext for sex discrimination. The VA did not meet its high burden of proof on this issue, and therefore we reverse the district court's grant of summary judgment to the VA on the plaintiffs' EPA claim.

B. Beck-Wilson's VII Wage Discrimination Claim

Laura Beck-Wilson, the only plaintiff to have exhausted her Title VII administrative remedies to allow her to advance a Title VII claim, also appeals the district court's grant of summary judgment to the VA on that claim. A Title VII claim of wage discrimination parallels that of an EPA violation insofar as it incorporates the EPA's affirmative defenses. *Washington County v. Gunther*, 452 U.S.

161, 167-71 (1981). An employer may therefore avoid liability under a Title VII wage discrimination claim if it can establish one or more of the four affirmative defenses in the EPA. *See Odomes*, 653 F.2d at 251 ("The four exemptions enunciated by the Equal Pay Act are applicable to Title VII claims of unequal pay for equal work.") (quotation omitted). The district court held that the VA was entitled to summary judgment on Beck-Wilson's EPA claim because the VA had established an affirmative defense, and so it also granted summary judgment to defendant on her Title VII claim. "[W]here the plaintiff defeats the defendant's motion for [summary judgment] with respect to her EPA claim by raising a genuine issue as to the defendant's reason for the differential wage, she also defeats [its] motion for [summary judgment] brought against her parallel Title VII claim." *Buntin*, 134 F.3d at 801. Because we hold that plaintiffs defeated the VA's motion for summary judgment on the EPA claim, the district court's decision to grant summary judgment to the VA on Beck-Wilson's Title VII claim must also be reversed.

III. CONCLUSION

Accordingly, we **REVERSE** the district court's grant of summary judgment to the defendant with respect to plaintiffs' EPA and Title VII wage discrimination claims, and **REMAND** this case to the district court for further proceedings in conformity with this opinion.

[ENTERED: MARCH 17, 2006]
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-4010

LAURA BECK-WILSON et al.,
Plaintiffs - Appellants,

v.

ANTHONY PRINCIPI,
Secretary of Veterans Affairs,
Defendant - Appellee.

Before: DAUGHTREY, MOORE, and McKEAGUE, Circuit Judges

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment to defendant Anthony Principi with respect to plaintiffs' EPA and Title VII wage discrimination claims is REVERSED, and the case is REMANDED for further proceedings in conformity with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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JUN 16 2010

No. 09-1100

In the Supreme Court of the United States

CONNIE E. YANT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
TODD M. HUGHES
DOUGLAS G. EDELSCHICK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners did not establish a prima facie case of wage discrimination under the Equal Pay Act where petitioners provided no evidence that disparities in the wages of nurse practitioners and physician assistants were based on sex.

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In the Supreme Court of the United States

No. 09-1100

CONNIE E. YANT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-22) is reported at 588 F.3d. 1369. The opinion of the Court of Federal Claims (Pet. App. 23-43) is reported at 85 Fed. Cl. 264.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-2) was entered on December 14, 2009. The petition for a writ of certiorari was filed on March 15, 2010 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Pay Act of 1963, 29 U.S.C. 206(d), protects employees of private or public employers, including the federal government, 29 U.S.C. 203(d), (e)(1) and (2)(A), from wage discrimination "on the basis of sex."

29 U.S.C. 206(d)(1). The Act generally makes it unlawful for an employer to "discriminate * * * between employees on the basis of sex by paying wages to employees [within an] establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work" if the relevant jobs "require[] equal skill, effort, and responsibility" and are "performed under similar working conditions." *Ibid.* The Act excepts from that general prohibition all payments "made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." *Ibid.*

This Court has explained that a plaintiff's prima facie case of wage discrimination under the Equal Pay Act requires a "show[ing] that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974) (*Corning*) (quoting 29 U.S.C. 206(d)(1)). If a plaintiff carries that burden, "the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." *Id.* at 196.

2. a. The Tennessee Valley Healthcare System (TVHS) is a component of the Department of Veterans Affairs (VA) within the VA's Veterans Health Administration (VHA). The TVHS employs substantial numbers of men and women both as "nurse practitioners" (a category of registered nurses) and as "physician assistants." Pet. App. 6-7. Congress has regulated the amount of pay for the VHA's registered nurses and physician assis-

tants since 1946 and 1975, respectively. See Act of Jan. 3, 1946, ch. 658, §§ 5(d), 7(a), 59 Stat. 676-677; see Veterans' Administration Physician and Dentist Pay Comparability Act of 1975, Pub. L. No. 94-123, § 5(d)(2), 89 Stat. 675.

Before 1990, Congress specified that the VA's registered nurses be paid under an eight-grade federal pay system set by Executive order. 38 U.S.C. 4107(b)(1) (1988); cf. 38 U.S.C. 4104(1) (1988) (nursing appointments). The VA Nurse Schedule, like the federal General Schedule, provided ten steps for each pay grade and, at each step within a grade, the resulting salary increased in equal increments. See, *e.g.*, Exec. Order No. 12,698, § 1(c) & Sched. 3-A, 54 Fed. Reg. 53,473, 53,479 (1989). Congress also specifically directed that (before 1990) the VA's "[p]hysician assistants" shall be paid under the "Nurse Schedule grade title and related pay ranges." 38 U.S.C. 4107(f) (1988). Accordingly, until 1990, the VA's registered nurses and physician assistants could have been paid at the same rate of pay under the single nationwide pay schedule required by statute.

On August 15, 1990, Congress altered the statutory pay provisions for registered nurses, including nurse practitioners. The Department of Veterans Affairs Nurse Pay Act of 1990, Pub. L. No. 101-366, 104 Stat. 430, established a new four-grade pay system for registered nurses, established the range of salaries for the steps within each grade, and created a locality pay system to "increase or decrease the rates of basic pay" for nurses based on healthcare wage data for each locality. §§ 101(a) and (c), 102(b), 104 Stat. 430-434 (38 U.S.C. 4107(b), 4141(b), (c)(1), (d)(2), (3) and (e)); see *Allison* v. *United States*, 39 Fed. Cl. 471, 473 (1997) (discussing nurse locality pay system). Congress has repeatedly re-

vised the statutory pay system for registered nurses since 1990 by, *inter alia*, expanding the system to five pay grades and requiring mandatory adjustments to the pay schedule to match any percentage increases in the General Schedule rate of pay. See 38 U.S.C. 7404(b), 7451(b), (d)(1)(A) and (e)(1).

Although Congress substantially altered the VA's statutory pay system for registered nurses in 1990 by creating a new pay system, it did not extend that change to the VA's physician assistants. Congress instead directed that "[p]hysician assistants * * * shall continue to be paid * * * according to the Nurse Schedule in [38 U.S.C.] section 4107(b) * * * as in effect on August 14, 1990," *i.e.*, one day before Congress enacted the VA Nurse Pay Act of 1990. Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, § 301(a), 105 Stat. 208 (38 U.S.C. 7451 note). The statutory pay schedule for VA physician assistants therefore continues to be governed by the VA's pre-1990 nurse pay schedule.

The nationwide statutory pay system for the VA's physician assistants has eight pay grades and ten steps within each grade. See 38 U.S.C. 4107(b)(1) (1988); Exec. Order No. 13,525, § 1(c), Sched. 3 & n.****, 74 Fed. Reg. 69,231, 69,235 (2009). In contrast, the separate statutory pay system for the VA's registered nurses has five pay grades, twelve steps per grade, and pay ranges that vary by locality. See 38 U.S.C. 7404(b), 7451(b), (c)(1), (3) and (d)(3); Department of Veterans Affairs, *VA Handbook 5007: Pay Administration* Pt. X, Ch. 1, §§ 2-3, at X-1 to X-2 (2002), http://www1.va.gov/vapubs/viewPublication.asp?Pub_ID=188. Congress has required that the rate of pay for registered nurses shall increase in "equal increments" with each succes-

sive step within each grade, and that the rate of pay for the top step within each grade normally be no more than 133% of that for step 1. 38 U.S.C. 7451(c)(1) and (3).

In some VA facilities, such as those within the TVHS, the locality-based pay system required by statute for a VA nurse practitioner may yield a lower salary than that under the nationwide pay system for a VA physician assistant who performs functionally similar jobs at the facility with roughly equivalent experience. See Pet. App. 12, 25. In VA facilities in other regions of the country, however, a higher locality adjustment for nurses may result in physician assistants with similar experience and job responsibilities being paid less than their nurse practitioner counterparts. See *id.* at 12 (citing Equal Pay Act lawsuit by majority-male VA physician assistants in Texas, *Alverson* v. *United States*, 88 Fed. Cl. 331 (2009)).

b. Petitioners are 35 male and female nurse practitioners who work or have worked for the TVHS. Pet. App. 6; see Compl. 1 (naming petitioners). Petitioners allege that the VA has "discriminated against [nurse practitioners]" at TVHS—both male and female—"by paying them less than" male and female physician assistants at TVHS, who tend to be "predominately male." Pet. App. 7. From 2004 to 2008, approximately 78%-80% of the nurse practitioners at TVHS were female whereas 40%-44% of the physician assistants were female. *Ibid.* Petitioners claim that the differences in nurse and physician-assistant pay at TVHS constituted unlawful wage discrimination on the basis of sex in light of the gender ratios for the majority (78%-80%) female nurse practitioners and majority (56%-60%) male physician assistants. Petitioners, however, presented no evidence that wage disparities between the nurse practitioner

locality pay scale at TVHS and the national physician assistant pay scale were based upon sex.

3. The Court of Federal Claims (CFC) entered summary judgment for the government. Pet. App. 23-43. The court reasoned that the Equal Pay Act's provisions prohibiting wage discrimination "on the basis of sex," 29 U.S.C. 206(d)(1), did not apply to petitioners' claims, which were based upon wage disparities between two groups of employees that each contained substantial numbers of both men and women. Pet. App. 40-42.

4. The court of appeals affirmed. Pet. App. 3-15. The court of appeals articulated the legal standards established by this Court in *Corning* for analyzing an Equal Pay Act claim, *id.* at 9-10 (quoting *Corning*, 417 U.S. at 195-196, 208), analyzed the circumstances addressed by *Corning*, *id.* at 11-12, and explained that "*Corning* * * * guides our decision," *id.* at 11. The court reasoned that petitioners need not present proof of discriminatory intent under the Act, but explained that they must nevertheless establish that wage "discrimination based on sex exists or at one time existed" to prove their case. *Id.* at 13. The court concluded that petitioners failed to establish a prima facie case of such discrimination because "[m]ere reliance on gender ratios of two groups [of employees] does not establish discrimination based on sex," *id.* at 14, and because petitioners presented no evidence to support the conclusion that the wage differential between the nurse practitioner pay scale at TVHS and the national pay scale for physician assistants was based upon sex. *Id.* at 12-13.

Judge Prost concurred in the result, explaining that he would affirm on the reasoning of the CFC. Pet. App. 16-22.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. The court of appeals correctly concluded that petitioners failed to proffer sufficient evidence at summary judgment to establish a prima facie case of wage discrimination under the Equal Pay Act. Petitioners contend that the court "improperly exp[a]nded" what plaintiffs must establish by "add[ing] a new requirement * * * that the plaintiff demonstrate either a historic or current pay differential based on sex." Pet. 9-10. Petitioners are incorrect. The Equal Pay Act by its terms has always required that plaintiffs prove wage "discriminat[ion] * * * on the basis of sex," 29 U.S.C. 206(d)(1), and, to survive summary judgment, petitioners had to produce evidence sufficient to reasonably infer that the VA "discriminate[d] * * * between employees on the basis of sex" by "paying wages to employees * * * at a rate less than the rate at which [it] pays wages to employees of the opposite sex * * * for equal work," *ibid.* See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974).

Petitioners' evidence of wage discrimination was that a majority (78%-80%) of the nurse practitioners at TVHS were female; that there were somewhat more male (56%-60%) than female (44%-40%) physician assistants at TVHS; and that the VA pays physician assistants (both male and female) more than it pays its nurse practitioners (both male and female) working in similar positions at the TVHS. Pet. App. 7, 19. The court of appeals correctly concluded that such evidence, standing alone, is inadequate to establish a prima facie case, *i.e.*, that "an employer pays different wages to employees of

opposite sexes." *Corning*, 417 U.S. at 195. The "[m]ere reliance on gender ratios" in a case where the male *and* female nurse-practitioner petitioners claim sex discrimination "fail[s] to raise a genuine issue of material fact that the pay differential between [nurse practitioners] and [physician assistants] is based on sex." Pet. App. 14-15; cf. *id.* at 19 (Prost, J, concurring) (concluding that petitioners failed to prove prima facie case of discrimination based on sex "given the significant participation of each gender in both classes, and given that the [petitioners] failed to allege that the significant participation was some attempt to escape liability under the [Equal Pay Act]").

There is no dispute that the VA's nurse practitioner locality pay scale applies equally to male and female nurse practitioners and that the VA's national physician assistant pay scale likewise applies equally to male and female physician assistants. Pet. App. 12-13. Congress specifically required by statute that the VA's registered nurses and physician assistants be paid under different statutory pay systems. And petitioners produced no evidence that regional fluctuations in pay between the two gender neutral pay scales were themselves sex-based. Cf. *City of L.A. Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 710 n.20 (1978) ("Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another."). A wage "differential is 'based on' the factor of sex only if the factor of sex was a cause-in-fact of the differential," *Peters* v. *City of Shreveport*, 818 F.2d 1148, 1161 (5th Cir. 1987), cert. denied, 485 U.S. 930 (1988), abrogated on other grounds, *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 238 n.2 (1989) (Title VII grounds), and, here, petitioners pre-

sented nothing that might establish such a wage difference based on sex.

In *Corning*, the Court analyzed two distinct periods of Corning's employment practices and concluded that evidence from the first period (from 1964 to June 1966) established a prima facie case because it showed that Corning had "pa[id] different wages to employees of opposite sexes 'for equal work.'" *Corning*, 417 U.S. at 195; see *id.* at 195-205 (Part II of opinion). The evidence demonstrated that, from 1964 to 1966, Corning paid its night-shift inspectors, who were "all male," significantly more than its day-shift inspectors, who were "all female." *Id.* at 192-194. And because the Court found the day- and night-shift jobs constituted equal work, the Court concluded that the evidence constituted a prima facie case of wage discrimination because Corning had paid "workers of one sex more than workers of the opposite sex for equal work." *Id.* at 196, 203; cf. *id.* at 204 (emphasizing that the night-shift inspection work was "performed solely by men").[1]

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[1] After concluding that Corning violated the Equal Pay Act from 1964 to 1966, the Court answered the "distinct question[]" whether Corning's post-1966 actions had "cure[d] its violation of the Act," *Corning*, 417 U.S. at 194-195, by examining the period "after 1966 when" Corning had taken meaningful steps "to end discrimination" by allowing women to work on the higher-paid night shift, *id.* at 205. See *id.* at 205-210 (Part III of opinion). The Court emphasized that the question for that post-violation period was "not whether the company * * * treated men the same as women after 1966," but rather was whether Corning's actions had "remedied the specific violation" that it had previously committed. *Id.* at 206. The Court reasoned that the Equal Pay Act required that employers increase "[t]he lower wage rate * * * to the level of the higher" in order to redress statutory violations, and concluded that Corning therefore was obligated by statute to cure its 1964-1966 violation of the Act by "equalizing the base wages of female day

Here, no such showing has been made. The petitioners—both male and female—allege that they were victims of wage discrimination on the basis of sex. Accordingly, the premise for the Equal Pay Act claim advanced by those nurse-practitioner petitioners who are male is that the VA paid female physician assistants with comparable experience at a higher rate for equal work. The nurse-practitioner petitioners who are female must likewise show that the VA paid male physician assistants with comparable experience at a higher rate for equal work. There is no dispute that both male and female physician assistants were paid more, but petitioners' own showing in this case merely illustrates that that differential in pay is itself *not* based on sex. It shows simply that physician assistants—both male and female—are paid more than the male and female nurse practitioners at TVHS. Unlike *Corning*, where the evidence showed an all-male group and a lower-paid all-female group, the evidence here permits no reasonable inference of a wage differential based on sex.

There is no dispute that, as petitioners have stressed and as the court of appeals has recognized, "intent is not [an] element required under the Equal Pay Act." Pet. 9; see Pet. App. 13; accord *Beck-Wilson* v. *Principi*, 441 F.3d 353, 360 (6th Cir. 2006); *Peters*, 818 F.2d at 1153.

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inspectors with the higher rates paid the night inspectors." *Id.* at 206-207 (citation omitted). "To permit the company to escape that obligation" simply by agreeing in 1966 "to allow some women to work on the night shift at a higher rate of pay," the Court explained, "would frustrate, not serve, Congress' ends," *id.* at 208, by "perpetuat[ing] the effects of the company's prior illegal practice of paying women less than men for equal work." *Id.* at 209-210. In this case, where petitioners failed to establish any violation of the Act, the question of a statutory cure for past violations is not presented.

But the absence of an intent requirement does not eliminate a plaintiff's obligation to "show that an employer pays *different wages to employees of opposite sexes* 'for equal work.'" *Corning*, 417 U.S. at 195 (emphasis added). Petitioners failed to meet that obligation here.

2. a. The decision of the court of appeals does not conflict with any decision of any other court of appeals. Petitioners cite to decisions indicating that an Equal Pay Act plaintiff need not establish either "complete" or "near-perfect diversity" in sex between groups of employees whose wages are being compared. Pet. 10-11 (quoting *Beck-Wilson*, 441 F.3d at 362, and *Peters*, 818 F.2d at 1153). But petitioners' assertion of a conflict incorrectly presumes that the court of appeals in this case held that a Equal Pay Act claim cannot be established in the absence of such complete (or near-complete) gender diversity. The court of appeals did not impose such a requirement. See Pet. App. 14 ("the ratios of males to females are irrelevant"); see also *id.* at 17, 19-20 (Prost, J, concurring) (recognizing that "[m]ixed-gender groups will be, in some circumstances, capable of alleging violations of the [Equal Pay Act]").

Moreover, nothing in *Beck-Wilson* or *Peters* reflects a division of authority on the questioned presented. In *Beck-Wilson*, the court emphasized that the VA facility in that case had created a special, higher pay scale for their physician assistants in 1990 to address a retention and recruitment problem, but, long after the problem abated, the facility retained the higher pay for physician assistants by "continu[ing] to certify to the VA" that the special pay "remain[ed] necessary" when it was not. 441 F.3d at 357-358. The facility's nurse practitioners were also 95% female whereas its physician assistants were 85% male. *Id.* at 362. In that context, the court of ap-

peals concluded that summary judgment was inappropriate. Among other things, the court reasoned that "complete gender diversity" was not necessary to establish an Equal Pay Act violation in the case and concluded that "[t]he fact that a small minority" of the facility's higher-paid physician assistants were female and a "small minority" of its lower-paid nurse practitioners were male was "not fatal to [the] plaintiffs' [Equal Pay Act] claim." *Ibid.* *Beck-Wilson* did not consider, much less hold, that a prima facie case could be established solely by comparing the wages of groups that are markedly more gender mixed. And it does not otherwise speak to the situation here, where a group of male and female nurse practitioners allege wage discrimination based *solely* on the pay to physician assistants under a nationwide pay system and where the physician assistants at a facility approach gender parity (56%-60% male, 44%-40% female) and the nurse practitioners include more than a "small minority" of men (20%-22%).

In *Peters*, the City of Shreveport argued that the plaintiffs had failed to prove a "prima facie case of sex discrimination" because lower-paid police communication officers had "historically been * * * men as well as women." 818 F.2d at 1152. The Fifth Circuit agreed with the City that at "a certain indefinable point" gender integration in a position will show that "any wage differential is clearly" not one based on sex, *id.* at 1164, and the court did not dispute that that point could be reached where 25% of the lower-paid employee group were men. See *id.* at 1164-1165. The court then concluded that, although 25% of the lower-paid officers had been men, the district court did not clearly err in finding discrimination on the basis of sex because half of the men in that group were physically disabled and "in the

same position as women in the local job market" while the other half of the men merely worked at the job on a "temporary basis" while waiting for a higher-paid City position or to supplement a pension. *Ibid.* Nothing in *Peters* suggests that the gender ratio in this case—20%-22% men in the lower-paid group and 40%-44% women in the higher-paid group—can, standing alone, establish that a differential in pay is "based on sex."

b. Petitioners assert a division of authority based on *Aldrich* v. *Randolph Central School District*, 963 F.2d 520 (2d Cir.), cert. denied, 506 U.S. 965 (1992), and *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977), citing those decisions for the claim that a state's civil-service system or regulatory regime cannot excuse a wage differential based on sex. See Pet. 11. That assertion is meritless. Neither case confronted a question similar to that here, and neither addressed the requirements of a prima facie case. Indeed, both *Aldrich* and *Usery* (like *Corning*) confronted claims that an all-female group was paid less than an all-male group of employees who did substantially the same work. See *Aldrich*, 963 F.2d at 522 (female school "cleaner" paid less than all male school "custodians"); *Usery*, 544 F.2d at 151 (hospital's all-female "beauticians" paid less than hospital's all-male "barbers"). In those contexts, which involved no gender diversity within the higher- and lower-paid employee groups, the courts resolved the questions presented in ways that are wholly irrelevant to this case. See *Aldrich*, 963 F.2d at 524-527 (holding that (1) trial was warranted to resolve whether a cleaner and custodians performed the "same work" and (2) a state's civil service examination and classification system qualifies as a factor other than sex justifying a wage

differential only when it advances a "bona fide business-related reason" in the relevant job context); *Usery*, 544 F.2d at 152-154 (holding that (1) work of beauticians and barbers were substantially equal and (2) a state's "separate[ ] licens[ing]" regimes for the two vocations is not "controlling").

3. This Court's review is unwarranted for the additional reason that the wage differential between the VA's nurse practitioners and physician assistants is lawful because it is required by federal statute and is thus "based on [a] factor other than sex," 29 U.S.C. 206(d)(1). See *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994) (a respondent may "rely on any legal argument in support of the judgment below"); accord *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997).

Congress's 1990 decision to abandon a unitary, national pay system for the VA's registered nurses and physician assistants and to establish different statutory pay programs for these two professions necessarily requires that the professions be paid differently. See pp. 4-6, *supra* (explaining systems). It is mathematically impossible to consistently pay nurses and physician assistants the same amount under the two separate statutory pay systems. The pay at each of the 60 nurse grade and step combinations, for instance, cannot be mapped to matching positions on the physician assistant pay scale, which has 80 grade and step combinations. Moreover, the fact that Congress has imposed a national physician-assistant pay scale and required nurse pay to vary by locality reflects Congress's intent that nurses and physician assistants be paid different amounts.[2] The

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[2] Congress has authorized the payment of locality pay to physician assistants, but the amount of such pay is set nationally by executive

only way to create pay equity for the nurses and physician assistants would be for Congress to re-enact a single pay system for both. Complying with the separate statutory pay systems mandated by Congress in 1990 thus cannot violate the Equal Pay Act of 1963.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
TODD M. HUGHES
DOUGLAS G. EDELSCHICK
Attorneys

JUNE 2010

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order for large geographic areas that are entirely different from the local labor-market areas governing VA nurse pay under 38 U.S.C. 7451. See 5 U.S.C. 5302(1)(C), 5304 (2006 & Supp. II 2008); Exec. Order No. 13,525, § 5 and Sched. 9 & n.1, 74 Fed. Reg. at 69,231, 69,242; 5 C.F.R. 531.603; see also 38 U.S.C. 7451(d)(2) and (3) (nurse pay locality adjustment).